Florida Law Review

Volume 65 | Issue 2 Article 3

March 2014

Judicial Logrolling

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JUDICIAL LOGROLLING

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Abstract

In the federal judicial system, multiple judges hear cases on appeal. Although assigning cases to multiple judges provides a number of benefits, it also generates the potential for conflict. Because each judge has his own set of preferences and values, judges on appellate panels often disagree with each other. Judges currently resolve these disagreements by filing separate opinions or drafting compromise opinions. A different way to resolve these disagreements is to allow vote trading across cases. Scholars and judges have condemned this practice, however, and judges have insisted that it does not occur.

This Article argues that the blanket condemnation of vote trading is unwarranted. It explains that there is more than one form of potential vote trading. Judges might trade votes to form majority support for the disposition of cases, or they might trade votes to form majority support for rationales in opinions. They may also trade votes to form supermajority coalitions for decisions that a majority of judges already support. Each form of vote trading presents different sets of benefits and objections. In some situations, vote trading may improve the quality of decisions, result in better guidance for future cases, or enhance the prestige of the courts. In other situations, vote trading may undermine judicial legitimacy and violate basic principles like due process. This Article analyzes these benefits and objections, and it concludes that vote trading should be allowed, if not encouraged, in some situations.

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INTRODUCTION

On June 25, 2012, the Supreme Court in *Arizona v. United States* struck down substantial portions of Arizona's controversial immigration law, S.B. 1070, by a vote of 5–3.[1] One of the Justices in the majority was Chief Justice John Roberts,[2] something of a surprise given the liberal nature of the ruling. Following the decision, several journalists and scholars speculated that Chief Justice Roberts joined the majority in *Arizona* through a vote trade with Justice Anthony Kennedy, who also joined the majority in the *Arizona* decision.[3] The theory was that Chief

1. 132 S. Ct. 2492, 2497, 2510 (2012).

2. *Id.* at 2497.

3. Noah Feldman, *Justice Kennedy Leans Liberal—for Now*, BLOOMBERG VIEW (June 25, 2012, 12:16 PM), http://www.bloomberg.com/news/2012-06-25/justice-kennedy-leans-liberal-for-now.html (suggesting that Chief Justice Roberts's vote was "a sign that [Chief Justice] Roberts . . . was hoping to bring [Justice] Kennedy to his side in the health-care

Justice Roberts agreed to strike down the Arizona law in exchange for Justice Kennedy voting to strike down the Affordable Care Act.[4] It turns out, of course, that the speculation was incorrect: Chief Justice Roberts himself voted to uphold the Affordable Care Act.[5]

But the suggestion that Chief Justice Roberts might have traded votes with Justice Kennedy is remarkable. Judges and scholars have almost uniformly condemned the practice,[6] and judges have insisted that vote trading does not occur.[7] But with few exceptions, those who have

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decision"); Jason Kissner, *Did Justice Roberts Trade Votes with Justice Kennedy?*, AM. THINKER (June 27, 2012), http://www.americanthinker.com/2012/06/did_justice_roberts_trade_votes_with _justice_kennedy.html (raising the possibility of "vote-swapping"); Ben Shapiro, *Why Did Chief Justice Roberts Vote Against AZ's Law?*, BREITBART (June 25, 2012), http://www.breitbart.com/Big-Government/2012/06/25/Chief-Justice-Roberts-AZ-immigration (suggesting that Chief Justice Roberts's vote might be due to "vote-swapping").

4. *See* Shapiro, *supra* note 3.

5. Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2601 (2012).

6. RICHARD A. POSNER, OVERCOMING LAW 126 (1995) ("[V]ote trading by judges is condemned . . . ."); MAXWELL L. STEARNS, CONSTITUTIONAL PROCESS: A SOCIAL CHOICE ANALYSIS OF SUPREME COURT DECISION MAKING 122 (2000) (stating that strategic voting is "indefensible"); Evan H. Caminker, *Sincere and Strategic Voting Norms on Multimember Courts*, 97 MICH. L. REV. 2297, 2300 (1999) (stating that "stark vote trading across unrelated cases [is] roundly condemned"); Linda R. Cohen & Matthew L. Spitzer, *Solving the* Chevron *Puzzle*, 57 LAW & CONTEMP. PROBS. 65, 84 (1994) ("[O]pen vote trading may violate norms of appropriate behavior on the Court."); Lisa T. McElroy & Michael C. Dorf, *Coming off the Bench: Legal and Policy Implications of Proposals to Allow Retired Justices to Sit by Designation on the Supreme Court*, 61 DUKE L.J. 81, 101 (2011) (noting that "the Court's culture does not allow explicit logrolling"); Thomas W. Merrill, *The Making of the Second Rehnquist Court: A Preliminary Analysis*, 47 ST. LOUIS U. L.J. 569, 607 (2003) ("It is often observed—correctly—that logrolling is prohibited under the decisional norms of the Supreme Court, but it is impossible to erase considerations of good will entirely from human behavior."). For rare exceptions to this view, see Caminker, *supra*, at 2333–75 (pointing out the weaknesses in the arguments against vote trading); Lynn A. Stout, *Strict Scrutiny and Social Choice: An Economic Inquiry into Fundamental Rights and Suspect Classifications*, 80 GEO. L.J. 1787, 1826 n.164 (1992) (stating that judicial logrolling might improve "the stability of appellate voting and its accuracy in measuring group preferences").

7. ROBERT A. CARP & RONALD STIDHAM, THE FEDERAL COURTS 160 (Cong. Quarterly Inc. 3d ed. 1998) ("[T]here is virtually no evidence for [logrolling] in the judiciary.") (emphasis omitted); H.W. PERRY, JR., DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES SUPREME COURT 198–215 (1991) (interviewing Justices who denied logrolling); STEARNS, *supra* note 6, at 66 (stating that "appellate courts . . . generally eschew vote trading across issues within cases and across cases"); Tonja Jacobi & Matthew Sag, *Taking the Measure of Ideology: Empirically Measuring Supreme Court Cases*, 98 GEO. L.J. 1, 16 n.73 (2009) (stating that "Justices consistently deny" that they "engage in cross-case logrolling"); Mark Tushnet, *Themes in Warren Court Biographies*, 70 N.Y.U. L. REV. 748, 764 n.86 (1995) (stating that the author's examination of Justice Brennan's papers revealed "nothing indicating an explicit 'deal' for votes"); Patricia M. Wald, *Collegiality on a Court*, 40 FED. B. NEWS & J. 521, 524 (1993) (stating that "[b]argaining seldom—I would almost say never—takes place between cases"). *But see* L.A. Powe, Jr., *The Obscenity Bargain: Ralph Ginzburg for* Fanny Hill, 35 J. SUP. CT. HIST. 166, 166–67 (2010) (detailing Justice Fortas's willingness to change his vote in one case in return for Justice Brennan switching his vote in another case).

objected to the practice have not explained why they object to vote trading in the judiciary. Instead, they have stated simply that vote trading is inappropriate.[8]

This condemnation of judicial vote trading—commonly referred to as logrolling—is too simplistic. Logrolling among judges may come in many forms and arise in a variety of circumstances, and thus no single set of objections applies to all forms of logrolling. Judges may exchange votes on the appropriate judgment in a case—as for example, when Judge *A* votes to support Judge *B*'s preferred disposition in one case in exchange for Judge *B* supporting Judge *A*'s preferred disposition in another case. Judges who agree on the disposition of a case may exchange votes on the rationale supporting that disposition, as when a judge who concurs in the judgment agrees to join the plurality's opinion in exchange for a similar vote from one of the judges in the plurality in another case. Or judges may even exchange votes where the traded votes are not critical to the decision. For example, judges may trade votes, not to secure majority support for a decision, but to bolster support for a decision that already has majority support.

Each form of logrolling potentially provides different sets of benefits. For example, permitting vote trading on dispositions may provide a better mechanism for resolving a case when no single judgment has majority support. In that situation, the court cannot enter judgment in the case. Currently, courts deal with this problem through the informal procedure of requiring one group of judges to yield and vote contrary to their sincere views. The outcome of this procedure often depends on which judge is more stubborn than on which disposition is better. Allowing logrolling on dispositions would potentially improve this process by resolving these outcome disputes through market transactions instead of by which judge blinks first.

Similarly, allowing vote trading on rationales could potentially increase doctrinal clarity. One of the core functions of the courts of appeals is to provide guidance through their opinions in future cases. Disagreement among appellate judges, however, often impairs that task.[9] These disagreements may result in the court failing to issue a binding opinion that has majority support. Or they may result in a

8. *See, e.g.*, POSNER, *supra* note 6, at 126 ("[V]ote trading by judges is condemned . . . ."); Merrill, *supra* note 6, at 607 ("[L]ogrolling is prohibited under the decisional norms of the Supreme Court . . . ."); Cohen & Spitzer, *supra* note 6, at 84 ("[O]pen vote trading may violate norms of appropriate behavior on the Court."). For rare examples of scholarship that provide a more thorough analysis of whether judicial vote trading should be allowed, see Caminker, *supra* note 6, at 2300–01; Mark Tushnet, *The First (and Last?) Term of the Roberts Court*, 42 TULSA L. REV. 495, 498 (2007) (arguing that logrolling may reduce the quality of decisions).

9. *See* Frank B. Cross, *Collegial Ideology in the Courts*, 103 NW. U. L. REV. 1399, 1399–1400, 1413–14 (2009).

compromise opinion that, in its efforts to accommodate the views of the disagreeing judges,[10] either provides murky reasoning that cannot easily be followed or is so narrow that it provides no useful guidance for future cases. Logrolling provides a means for resolving these disagreements without sacrificing doctrinal clarity. Disagreeing judges can resolve their disagreements by trading votes across cases. One judge agrees to provide the critical vote in one case in exchange for another judge providing a critical vote in another case. This vote swap results in disagreeing judges supporting the same opinion without the need for altering the opinion to accommodate their divergent views.

Vote trading to create supermajorities or unanimity provides benefits of a different sort. Vote trading in that instance would not change the disposition or rationale in a case. Instead, as the stories surrounding the decisions in *Cooper v. Aaron*[11] and *Brown v. Board of Education*[12] suggest, courts may want to form supermajorities to strengthen the decision and minimize the excuse for disobedience.[13]

Each form of logrolling also raises different sets of objections. These objections fall into two general categories. First, allowing vote trading may undermine the legitimacy of the courts. Judges will no longer be engaged in the judicial business of deciding cases and writing opinions according to law and principle; instead, they would render decisions through negotiations and backroom deals. Second, vote trading may diminish the quality of decisions and opinions. The current system of having multiple judges independently decide each case ensures that no single judge's prejudices or errors affect a decision, and logrolling undermines this structural protection. But these objections apply to each type of logrolling in different ways. For example, one of the principal concerns with changing dispositions through vote trading is that it results in the courts deciding cases based not merely on the application of law, but also on the desire to achieve outcomes in other cases. That concern, however, does not apply to vote trading that does not change the outcome but merely establishes a majority opinion with a controlling rationale.

This Article untangles the arguments about the different types of judicial logrolling. It identifies the potential benefits of vote trading to produce outcomes, to generate majority support for rationales, and to

10. *See* CARP & STIDHAM, *supra* note 7, at 160–61 (describing how judges modify opinions to accommodate the views of others).

11. 358 U.S. 1, 4 (1958).

12. 347 U.S. 483 (1954); Lee Epstein, William M. Landes & Richard A. Posner, *Are Even Unanimous Decisions in the United States Supreme Court Ideological?*, 106 NW. U. L. REV. 699, 703 (2012) (noting that *Brown* is a famous example of a unanimous decision made by the Supreme Court).

13. *See* Scott C. Idleman, *A Prudential Theory of Judicial Candor*, 73 TEX. L. REV. 1307, 1389–90 (1995).

form supermajority coalitions, and it examines the objections to allowing vote trading for each of these reasons. It concludes that, although logrolling should generally be forbidden, it should be permitted, if not encouraged, in some instances. Vote trading could potentially enhance the appellate courts' ability to perform their functions, and there are situations where the objections to vote trading are not applicable or have minimal force. By carefully limiting logrolling to these situations, courts may be able to perform their functions more effectively without sacrificing legitimacy or the rule of law.

In examining this topic, this Article discusses only the federal judiciary, though the arguments equally apply to the state courts. It also keeps constant the assumption that appellate courts decide cases and render binding opinions through majority vote.[14]

The Article proceeds in four parts. Part I begins by introducing the concept of logrolling. It then discusses whether logrolling that results in a change in the disposition in cases should be permitted. It concludes that most vote trading that results in outcome changes should be forbidden, but that such vote trading may be permissible when a change in the outcome is incidental to developing legal doctrine and when disagreements among the members of the court prevent it from rendering a disposition.

Part II shifts from judgments to rationales. It examines the situation where judges may trade votes to generate majority support for rationales without changing the outcome of the case. It concludes that these trades are largely unobjectionable and promote the development of clearer doctrine, and accordingly they should be generally permitted.

Part III turns to logrolling designed to generate supermajority support for decisions. It explains that, although vote trading for this reason raises its own set of concerns, creating a supermajority may increase the legitimacy of rulings and reduce disobedience.

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14. The Constitution does not require that courts decide cases by a majority vote on outcomes. Instead, the practice of deciding cases by majority vote is a judicial creation. Indeed, that is the reason why the Supreme Court can adopt rules such as the procedure for granting certiorari under which certiorari is granted if only four of the nine Justices vote in its favor. *See* ARTEMUS WARD & DAVID L. WEIDEN, SORCERERS' APPRENTICES: 100 YEARS OF LAW CLERKS AT THE UNITED STATES SUPREME COURT 126 (2006). Congress could prescribe a different vote requirement for decisions in cases, and courts could decide to adopt a different default voting rule. Scholars have criticized the current voting protocols and have proposed different systems. *See, e.g.*, Lewis A. Kornhauser & Lawrence G. Sager, *The One and the Many: Adjudication in Collegial Courts*, 81 CALIF. L. REV. 1, 1 (1993) (arguing that courts should adopt a metavote where judges vote whether to vote by issue or outcome); David Post & Steven C. Salop, *Rowing Against the Tidewater: A Theory of Voting by Multijudge Panels*, 80 GEO. L.J. 743, 744 (1992) (arguing for issue-by-issue voting). In this Article, we accept the current voting protocols of majority vote on outcome.

Part IV seeks to capture the benefits of logrolling while avoiding the objections. It proposes that logrolling should be permitted, if not encouraged, in several limited situations, such as when no single rationale for a decision commands a majority of the judges hearing a case. It explains that permitting logrolling in these situations would not raise serious objections and would provide a useful tool for aiding appellate courts in performing their functions.

I. TRADING VOTES TO GENERATE OUTCOMES

Logrolling is the exchange of votes between judges. It captures the idea of "I'll vote for your decision if you vote for mine." In its simplest form, logrolling involves two judges swapping votes in two different cases. Judge *A* changes his vote in Case 1 in exchange for Judge *B* changing his vote in Case 2.

A judge has an incentive to participate in logrolling if the benefits of the vote swap exceed the costs.[15] These costs and benefits vary according to the views of the judge. One judge may consider a trade valuable because it results in a decision he favors, while another might dislike that trade because he does not favor that same decision. They also vary according to the type of vote cast. Judges cast essentially two votes in every case. One is on the judgment to be entered, and the other is on the reasoning supporting that judgment.[16] This Part discusses vote trading where the trade changes the judgments in cases by producing majority support for outcomes that would not otherwise have it. Part II discusses vote trading over rationales.[17]

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15. Gaining another judge's vote is not the only kind of benefit that may lead a judge to sell his vote. A judge may choose to change his vote, for example, in exchange for the ability to write the majority opinion, *see* Stephen J. Choi & G. Mitu Gulati, *Trading Votes for Reasoning: Covering in Judicial Opinions*, 81 S. CAL. L. REV. 735, 735, 739, 743, 765 (2008) (gathering evidence suggesting that such trades occur), or for personal gain, like a large sum of money—though this latter sort would be unlawful bribery, *see infra* Subsection I.B.2; *see also* Richard L. Hasen, *Vote Buying*, 88 CALIF. L. REV. 1323, 1339 (2000). This Article focuses on situations where the gain is another vote.

16. *See* Edward A. Hartnett, *A Matter of Judgment, Not a Matter of Opinion*, 74 N.Y.U. L. REV. 123, 126–29 (1999) (discussing the difference between judgments and opinions).

17. Judges engaged in a trade need not seek the same type of benefit from the vote exchange. A judge offering to change his vote to provide majority support for an outcome in one case might demand in exchange that the other judge support an opinion in another case in which he already agrees with the outcome. Similarly, logrolling need not occur only in the context of two judges exchanging one vote for one vote. Logrolling may involve judges trading votes in multiple cases. If a judge has particularly strong views in one case, he might be willing to trade his vote in two other cases in exchange for another judge's vote in one other case. Nor must logrolling be limited to an exchange between only two judges. One judge may be able to buy two other judges' votes by promising his vote in support of those judges in other cases. Likewise, logrolling need not be across cases. Judges can exchange votes in one case that presents multiple issues in order to achieve their preferred outcomes on those issues.

Entering judgments is the traditional role of courts.[18] Federal courts have jurisdiction only to resolve cases and controversies,[19] and judgments are the means for resolving those cases and controversies.[20] They constitute the authoritative settlement of the dispute.[21] They direct which party prevails and which party loses. The parties to the dispute are bound by the judgment, and courts may enforce their judgments through contempt proceedings.[22]

A vote swap over judgments would result in each judge providing the critical vote for an outcome that he thinks is incorrect; in exchange he gains majority support for an outcome that would otherwise not have it. For example, suppose Judge *A* prefers outcome X in Case 1 but is one vote short of securing that outcome, and in Case 2 he prefers outcome Y. Judge *B* has different preferences: he desires outcome X' in Case 1, and in Case 2 he prefers outcome Y', a position that is also one vote short of a majority. Judges *A* and *B* could exchange votes. Judge *A* would agree to vote in favor of outcome Y' in Case 2 in exchange for Judge *B* voting in favor of outcome X in Case 1. Through that exchange, Judge *A* would achieve his preferred outcome in Case 1, and Judge *B* would achieve his preferred outcome in Case 2.

A. *Benefits of Allowing Vote Trading on Outcomes*

Vote trading on outcomes has at least two potential benefits. First, it may result in better outcomes overall. Second, it provides a means for resolving cases in which a majority cannot agree on the appropriate disposition.

To start with how logrolling may produce better outcomes: Judges have incentives to participate in logrolling if the benefits of the vote swap exceed the costs.[23] When the swap is over outcomes, the exchange results in each judge supporting a decision that he thinks is incorrect,

18. DANIEL J. MEADOR & JORDANA S. BERNSTEIN, APPELLATE COURTS IN THE UNITED STATES 75–76 (1994) ("The court's formal action is embodied in its 'judgment,' a separate document directing the disposition of the case."); Hartnett, *supra* note 16, at 126–27. Judgments are separate from opinions. Judgments are the decrees entered against the parties in the case. Opinions, by contrast, are the justifications that courts provide for their judgments. Thomas W. Merrill, *Judicial Opinions as Binding Law and as Explanations for Judgments*, 15 CARDOZO L. REV. 43, 62 (1993) ("[J]udicial opinions are simply explanations for judgments—essays written by judges explaining why they rendered the judgment they did."). Opinions are not necessary for a court to enter judgment. A court may enter judgment without an opinion, and the judgment is binding on the parties to it even without an opinion. Hartnett, *supra* note 16, at 128; *see also, e.g.*, FED. R. APP. P. 36 ("The clerk must prepare, sign and enter the judgment . . . after receiving the court's opinion . . . if a judgment is rendered without an opinion, as the court instructs.").

19. *See* U.S. CONST. art. III, § 2, cl. 1.

20. Hartnett, *supra* note 16, at 127.

21. *Id.*

22. *See* Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 450 (1911).

23. *See* Caminker, *supra* note 6, at 2321.

but it avoids an incorrect decision in another case. That transaction is worthwhile if each judge concludes that the error costs that would result from the decisions without the vote trade exceed error costs that result with the vote trading.[24] Although the exchange produces one erroneous decision according to each judge's view, the exchange is worthwhile for each judge because it produces a correct decision in a more important case. Thus, from each of the judges' point of view, the exchange minimizes error costs.

For example, suppose there are two cases: Case 1 presenting an equal protection question and Case 2 presenting an Article III standing issue. Judge *A* strongly believes there has been a gross equal protection violation in Case 1 and that remedying that violation is extremely important, but he is one vote short of securing that outcome; in Case 2 he believes there is no standing but does not view the case as important. By contrast, Judge *B* believes there was not an equal protection violation in Case 1; in Case 2 he strongly believes that there is standing and that finding standing is important, a position that is also one vote short of a majority. Judges *A* and *B* each have an incentive to swap votes. Judge *A* would agree to find standing in Case 2 in exchange for Judge *B* voting in favor of finding an equal protection violation in Case 1. Under both Judge *A* and Judge *B*'s views, this exchange produces better overall results. If the judges voted sincerely instead of swapping votes, the outcomes—no equal protection violation and no standing—would have been worse from both judges' perspectives.

The benefit of allowing vote trading over outcomes is that it reduces error costs from the perspective of the judges constituting the majority.[25] According to each judge, the aggregate dispositions produced by vote trading are better overall. To be sure, there is no guarantee that the judges' perspective is correct by some external, objective measure. But the perspective of the judges is important. Since courts are the bodies that render decisions, their perspective on what constitutes the best result under the law is what matters.[26]

Logrolling has particular value for cases in which no single disposition commands a majority. That may occur because appellate courts always have more than two options in deciding a case; at the very least, the court may affirm, vacate, or reverse.[27] The court cannot issue a

24. *See id.* at 2319.

25. *See id.* at 2313.

26. *See, e.g.*, Richard H. Fallon, Jr., *Foreword: Implementing the Constitution*, 111 HARV. L. REV. 56, 142–43 (1997) (discussing the judiciary's role in resolving constitutional questions); Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1365 (1953) (arguing that the Supreme Court's essential role is implementing the Constitution).

27. There are other possibilities. For example, a court may dismiss the appeal. Moreover, a court may adopt some combination of judgments, such as affirming in part and reversing in

judgment without majority agreement on a disposition.[28]

Currently, courts do not have formal mechanisms to resolve this problem. Instead, judges resolve it informally by one group of judges joining a disposition that they do not prefer while at the same time explaining in their opinion that they are doing so only to create a majority disposition.[29] The D.C. Circuit's decision in *Massachusetts v. EPA* provides an illustration.[30] There, Massachusetts challenged as arbitrary and capricious the EPA's refusal to issue a rule regulating emissions that allegedly contributed to global warming.[31] The judges on the panel disagreed on the appropriate disposition. Judge Randolph thought the petition for review should be denied on the ground that the EPA's determination was not arbitrary and capricious.[32] Judge Sentelle concluded that the petition for review should be dismissed for lack of standing.[33] And Judge Tatel would have granted the petitions for review.[34] Because no disposition commanded a majority, Judge Sentelle voted with Judge Randolph to deny the petitions but explained in his opinion that he would have preferred dismissing for lack of standing.[35]

This informal mechanism is not particularly sensible. It does not give priority to larger groups of judges—pluralities have changed their

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part.

28. *See* Maxwell L. Stearns, *Should Justices Ever Switch Votes?:* Miller v. Albright *in Social Choice Perspective*, 7 SUP. CT. ECON. REV. 87, 109–10 (1999).

29. *See id.* at 110 ("In virtually every case in which no single judgment has first choice majority support, one or more justices who preferred a more extreme judgment as a first choice solved the potential impasse by switching his vote to a remand, thereby producing a majority for a single judgment.")

30. 415 F.3d 50, 60–61 (D.C. Cir. 2005) (Sentelle, J., dissenting in part and concurring in the judgment), *rev'd*, 549 U.S. 497 (2007).

31. *Id.* at 73 (Tatel, J., dissenting).

32. *Id.* at 58–59 (majority opinion).

33. *Id.* at 59–61 (Sentelle, J., dissenting in part and concurring in the judgment).

34. *Id.* at 61–82 (Tatel, J., dissenting).

35. *Id.* at 60–61 (Sentelle, J., dissenting in part and concurring in the judgment); *see also* Bragdon v. Abbott, 524 U.S. 624, 656 (1998) (Stevens, J., concurring) (voting to remand, rather than to affirm, to produce majority judgment); Pennsylvania v. Muniz, 496 U.S. 582, 608 (1990) (Rehnquist, J., concurring in part, concurring in the judgment in part, and dissenting in part) (casting vote to vacate and remand, rather than to reverse, to produce a majority judgment); Connecticut v. Johnson, 460 U.S. 73, 89–90 (1983) (Stevens, J., concurring) (voting to affirm, rather than to dismiss certiorari, to produce majority judgment); Md. Cas. Co. v. Cushing, 347 U.S. 409, 423 (1954) (plurality opinion) (voting to remand, rather than to reverse, consistent with concurring opinion); Klapprott v. United States, 335 U.S. 601, 619 (1949) (Rutledge, J., concurring) (voting to remand, rather than to reverse, consistent with plurality opinion); Von Moltke v. Gillies, 332 U.S. 708, 726–27 (1948) (plurality opinion) (observing that two concurring Justices have agreed to break deadlock by voting with plurality to remand, rather than voting to reverse); Screws v. United States, 325 U.S. 91, 134 (1945) (Rutledge, J., concurring) (switching vote to remand to allow disposition and observing that "[s]talemate should not prevail for any reason, however compelling, in a criminal cause or, if avoidable, in any other").

votes to accord with the vote of a concurrence in the judgment and vice versa.[36] More importantly, it requires a judge to give up something in exchange for nothing. The outcome thus may depend more on who is more stubborn than on the consequences of the dispositions.[37] Worse, the process does not even guarantee that there will be an outcome, because there may be situations where all the judges refuse to yield, producing the situation of no outcome.[38]

With logrolling, a judge would no longer be required to change his vote simply because someone has to in order to generate a majority disposition. Instead, it would break the impasse by empowering judges to change their votes in exchange for gaining votes in other cases that they think will produce better overall outputs from the court.

B. *Objections to Allowing Vote Trading on Outcomes*

Although allowing logrolling on outcomes may create certain benefits, the practice raises a number of objections. For example, permitting vote trading raises the concern that courts are not fulfilling their judicial role because they will be deciding cases based on negotiation instead of the application of the law. It also raises an ethical concern that judges are making decisions in exchange for a benefit in another case. A third objection is that vote trading may result in inequalities among the judges in the decisionmaking process. Finally, one might also think that allowing vote trading may reduce the quality of decisions produced by the courts.

1. Role of the Courts

One objection to logrolling that results in the change in outcome is that it is illegitimate. What makes courts courts and judges judges is that they decide cases by applying the law to the facts of the case.[39] It is only

36. *Cushing*, 347 U.S. at 423 (plurality opinion) (voting to remand, rather than to reverse, consistent with concurring opinion); *Klapprott*, 335 U.S. at 619 (Rutledge, J., concurring) (voting to remand, rather than to reverse, consistent with plurality opinion).

37. To be sure, the disposition that the judge agrees with may lead in the long run to the same result as the judge's preferred disposition; for example, dismissing Massachusetts's petition for review and denying that petition both resulted in Massachusetts losing. But the difference in the dispositions may still matter. For example, Judge Sentelle would not have assessed at all the EPA's rule because in his view the court did not have the power to rule whether the petition should be denied or granted. *Massachusetts*, 415 F.3d 50, 59–61 (D.C. Cir. 2005) (Sentelle, J., dissenting in part and concurring in the judgment), *rev'd*, 549 U.S. 497 (2007); *see also* Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 94 (1998) ("Without jurisdiction the court cannot proceed at all in any cause." (internal quotation marks omitted)).

38. This problem arises frequently in the analogous context of hung juries. *See* Sarah Thimsen, Brian H. Bornstein & Monica K. Miller, *The Dynamite Charge: Too Explosive for Its Own Good?*, 44 VAL. U. L. REV. 93, 99 (2009) (finding rates of hung juries in federal courts ranging from 1.2% to 2%).

39. Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 218–19 (1995).

because the law dictates an outcome that the courts have the authority to decide cases and controversies; deciding without a legal foundation creates the appearance of arbitrariness and risks converting the courts into political bodies.[40] Logrolling undermines this role, one might argue, because it results in a case being decided based on the outcome in *another* case, not because the law dictated the outcome.[41]

Before addressing the objection, it is worth clarifying precisely what the objection is. It is not accurate to say the decision does not depend on the application of law. Logrolling that results in a change in disposition is still a decision according to law—it is the view of the law of the "purchasing" judge. Logrolling thus does not result in a decision unmoored from the law; instead, it determines only whose vision of the law controls. One judge defers to another judge's views. Deference is a common phenomenon in judicial decisionmaking.[42] But with logrolling, deference results for bad reasons. Instead of deferring because of expertise or a law requiring deference,[43] a judge defers to accomplish a result in another case.

This objection has a good deal of merit. Basic principles of due process dictate that a party in one case should not be sacrificed for the benefit of a party in another case; the outcome in each case should be the consequence of the application of law.[44]

But that principle does not easily extend to cases presenting novel legal questions. Those cases cannot be decided by a simple application of law;[45] the judges must first fashion the rule.[46] One of the things that

40. *See* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 29–33 (1962); Tom R. Tyler & Gregory Mitchell, *Legitimacy and the Empowerment of Discretionary Legal Authority: The United States Supreme Court and Abortion Rights*, 43 DUKE L.J. 703, 783 (1994).

41. This argument does not extend to cases in which a majority of judges cannot agree on a disposition. In that situation, the trade does not affect outcome.

42. *See, e.g.*, Cullen v. Pinholster, 131 S. Ct. 1388, 1398 (2011) (deferring to state courts in habeas context); Anderson v. Bessemer City, 470 U.S. 564, 573–74 (1985) (deferring to lower courts on findings of fact); Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 844 (1984) (deferring to agencies).

43. *See* Paul Horwitz, *Three Faces of Deference*, 83 NOTRE DAME L. REV. 1061, 1093 (2008) (explaining that expertise and authority are the two bases for deference).

44. *See, e.g.*, State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 423 (2003) ("Due process does not permit courts . . . to adjudicate the merits of other parties' hypothetical claims against a defendant.").

45. Some have argued that in those cases judges should first fashion the rule and then decide the case based on the application of that rule. *See* RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION 2–13 (1996) (explaining that judges have "different understandings of central moral values embedded in the Constitution's text," and that those end values affect the way judges interpret the Constitution); RONALD DWORKIN, LAW'S EMPIRE 225–28 (1986) [hereinafter DWORKIN, LAW'S EMPIRE]. Although that process might be ideal, it seems quite likely that judges do consider the outcome of the case at hand in the shaping of the rule. *See, e.g.*, CASS R. SUNSTEIN, LEGAL REASONING AND POLITICAL

judges routinely consider in creating doctrine is the effect that the doctrine will have on future cases.[47] Indeed, the very foundation of the adage that hard cases make bad law is that judges sometimes should vote against the disposition that they initially think is correct in order to fashion a legal rule that may be better for future cases.[48] A judge thus may change his position on the outcome in one case based on considerations of fashioning a rule for future cases.

What this suggests is that, if vote trading on *rationales* is permitted in cases where the law is unclear, judges perhaps should be permitted to trade votes on rationales even if that trade results in a change in outcome in the case. As explained in Part II, allowing vote trading on rationales has the potential to generate better rules for future cases.[49]

One might argue that modifying a legal rule based on its impact in future cases is different from logrolling because the former focuses on the substance of the law in the case before the court. But that difference should not matter. Both situations involving modifying a judgment based on considerations other than the case before the court. If the role of the court is to decide the case before it according to the law, the court should not modify a judgment to account for cases not before the court.

Still, one might argue that courts should not sacrifice outcomes in the name of creating doctrine. Judges should neither trade votes on rationales nor craft rules with an eye toward future cases in deciding cases. That is a perfectly valid position. What matters is how we view the court on which the judges are engaging in logrolling. If the primary role of the court is to render judgments according to law and not to focus on formulating rules for future cases, then the judges on the court should not engage in logrolling that affects dispositions. But if we think that the court has an equal or greater obligation to announce rules—as with the United States Supreme Court—then logrolling that affects the disposition is less problematic if it is done to promote rule creation.[50]

CONFLICT 10–11 (1996) (arguing that judges decide novel cases by determining an outcome and then fashioning a rule to produce that outcome).

46. *See* DWORKIN, LAW'S EMPIRE, *supra* note 45, at 115; F. Andrew Hessick & Samuel P. Jordan, *Setting the Size of the Supreme Court*, 41 ARIZ. ST. L.J. 645, 663–64 (2009).

47. *See generally* Fallon, *supra* note 26, at 106–39 (arguing that considerations outside the facts of the case often affect the development of doctrine).

48. *See* N. Sec. Co. v. United States, 193 U.S. 197, 400 (1904) (Holmes, J., dissenting).

49. *See infra* Part II.

50. *See* Frank H. Easterbrook, *Foreword: The Court and the Economic System*, 98 HARV. L. REV. 4, 5–6 (1984); Kenneth W. Starr, *The Supreme Court and Its Shrinking Docket: The Ghost of William Howard Taft*, 90 MINN. L. REV. 1363, 1364 (2006).

2. Ethics

A closely related objection is that logrolling is unethical.[51] Instead of performing her duty to apply the law, a judge who engages in logrolling votes in order to gain something: she gains a vote to support her preferred position in one case in exchange for giving up a vote in another case.[52]

Our society has a strong aversion to official action motivated by a quid pro quo.[53] The norm underlies the prohibitions on bribery, which outlaws corruptly performing official actions in exchange for personal benefits.[54] Logrolling does not constitute bribery under current law, at least when the judge does not have a financial stake in the case at hand, because the emotional and professional satisfaction of achieving what the judge believes to be a correct outcome does not constitute a relevant personal interest.[55]

Still, an exchange of votes does constitute a quid pro quo. But exchanges are inevitable in a group with multiple members that must come to collective decisions.[56] Members must resolve disagreements through compromise under which each member gives something in return for gaining something. Indeed, exchanges and compromises are a regular occurrence on courts under current procedures. For example, when two judges disagree on doctrine, they often compromise in fashioning majority opinions.[57] That compromise is a quid pro quo. Each judge abandons his doctrinal position in exchange for the other

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51. *See* Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 YALE L.J. 31, 106 (1991) ("[U]nder prevailing ethical norms judges cannot engage in the sort of logrolling that legislators commonly employ.").

52. *See id.*

53. The argument against allowing a quid pro quo is that it results in officials acting for personal gain instead of pursuant to their duties as officials. Owen M. Fiss, *Money and Politics*, 97 COLUM. L. REV. 2470, 2478 (1997).

54. *See* 18 U.S.C. § 201 (saying that "whoever directly or indirectly, corruptly gives, offers or promises anything of value to any public official . . . with intent" to influence official action has committed a crime).

55. *See* United States v. Dorri, 15 F.3d 888, 894 (9th Cir. 1994) (Kozinski, J., dissenting) ("Legislative logrolling—Senator A tells Senator B 'I'll vote for your bill if you vote for a bailout of Corporation C'—isn't corrupt, unless A owns a chunk of C."); Hasen, *supra* note 15, at 1339 (explaining that trading votes is a form of logrolling that does not constitute bribery, but trading a vote for a tax exemption, a personal gain, would constitute bribery). Indeed, if emotional satisfaction from vote trades were illegal, the current practice of modifying an opinion (an official act) to gain another judge's vote would be illegal.

56. United States v. Cappas, 29 F.3d 1187, 1192 (7th Cir. 1994) ("[W]hen collective bodies are required to speak with one voice . . . compromises and logrolling are perhaps inevitable.").

57. William H. Rehnquist, *Chief Justices I Never Knew*, 3 HASTINGS CONST. L.Q. 637, 643 (1976) ("While of necessity much latitude is given to the opinion writer, there are inevitable compromises.").

judge doing the same. Both join an opinion that does not accurately reflect their legal positions, but they do so because they believe that the compromise opinion will result in lower error costs than would result from failing to produce a majority opinion.[58] Logrolling is not relevantly different. It simply expands the goods with which judges may compromise in deciding cases.

3. Equality

One common argument against allowing citizens to sell their votes in elections is that it leads to inequality in voting.[59] Because the wealthy have greater ability to buy votes than the poor, allowing vote selling results in the wealthy controlling policy decisions.[60] Logrolling is a form of vote selling—the vote is purchased with another vote instead of cash. One might worry that allowing judicial logrolling therefore might result in disparate power among judges in deciding cases. This would undermine the assumption that all judges on a panel should have an equal vote in a case, and it would increase the influence of one judge's values and preferences on the development of the law at the expense of others.

Judicial logrolling would present this concern only if judges had varying amounts of resources to trade for votes.[61] For example, because the chief judge has the power to assign opinions, he has more resources for trading.[62] But if the only currency is votes, all judges are equally situated because each judge gets only one vote in each case, and each vote is independent. As Professor Sherman Clark has explained, logrolling does not diminish political power among voters that have equal resources; instead, it provides a way for voters to demonstrate the intensity of their preferences.[63] A citizen may choose to give up his vote on issues that are less important to him in exchange for gaining support on issues that are more important to him, but in doing so he does not

58. *See infra* Section II.A. Similarly, judges may agree to withhold separate opinions in exchange for the withdrawal of another opinion or modifications to that opinion. Moreover, judges engage in the implicit quid pro quo of not dissenting or filing a separate opinion in exchange for their colleagues doing the same in other cases. *See* Gregory A. Caldeira & Christopher J.W. Zorn, *Of Time and Consensual Norms in the Supreme Court*, 42 AM. J. POL. SCI. 874, 877 (1998) ("Reciprocity is an important norm on the Court, and if a justice refrains from dissent, he or she may well expect the same treatment in the future from the current opinion-writer." (internal citations omitted)).

59. *See* Hasen, *supra* note 15, at 1330.

60. *Id.*

61. *See id.* at 1345.

62. Felix Frankfurter, *Chief Justices I Have Known*, 39 VA. L. REV. 883, 901 (1953) (noting that the power to assign opinions is the only additional power of the Chief Justice).

63. Sherman Clark, *A Populist Critique of Direct Democracy*, 112 HARV. L. REV. 434, 460 (1998).

diminish his overall voting power; he merely concentrates it on more important issues. So too with logrolling among judges. A judge will exchange votes on opinions only if the opinion that he joins is less important to him than the opinion that he gets others to join.

4. Quality of Decision

There are two different arguments for how logrolling may undermine the quality of decisions. The first involves the theory of decision by many minds. Under that theory, the decision that has the support of the most judges is more likely to be correct than any other decision. Logrolling undermines this scheme because it results in an outcome that a majority initially opposed. The second argument is that logrolling may produce an outcome that is less satisfying to the judges overall than would have resulted from sincere voting. Because the outcome-produced logrolling generates lower satisfaction, the argument goes, that outcome must be worse than the outcome that would have resulted from sincere voting.

a. Condorcet's Jury Theorem

One reason for having multiple judges on higher courts is that it reduces the chance for an error to affect the decision. When a case is before one judge, that judge's errors will necessarily affect the decision. If a trial judge misinterprets a statute, for example, that misinterpretation will affect the decision. On a panel of three judges, by contrast, at least two judges have to commit the error for it to affect the outcome, and that number increases as the size of the court increases. Thus, the odds of a correct decision increase as the size of the panel increases.

This principle is captured by Condorcet's Jury Theorem, which states that when certain conditions are met, the collective decision of a group is more likely to be correct as the size of that group increases, so long as the average member of the group is more likely than not to select the correct result from competing options.[64] Thus, for example, so long as the conditions for the theorem are met, if four judges on a five-judge panel think option A is correct and the other judge thinks option B is correct, the former group is more likely to be correct. The theorem underlies the practice of resorting to the audience in game shows when the contestant does not know the answer to a question.[65]

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64. Maxwell L. Stearns, *The Condorcet Jury Theorem and Judicial Decisionmaking: A Reply to Saul Levmore*, 3 THEORETICAL INQ. L. 125, 131 (2002).

65. JAMES SUROWIECKI, THE WISDOM OF CROWDS: WHY THE MANY ARE SMARTER THAN THE FEW AND HOW COLLECTIVE WISDOM SHAPES BUSINESS, ECONOMIES, SOCIETIES, AND NATIONS 3–4 (2004).

Assuming the conditions for the theorem are met, logrolling *could* increase the odds of producing a worse decision in a case where a majority prefers one outcome and a different outcome is produced through the logrolling. (The worse decision is only possible, not guaranteed, because the aggregation of the jury theorem only increases the likelihood of correctness.) Indeed, because the theorem says that the probability of the correctness of a conclusion increases with the size of the group supporting a particular conclusion, logrolling could produce a worse outcome even when there is only plurality support for an outcome and the logrolling produces a different result.[66] But even in that situation, the plurality must agree on the same rationale for the outcome; otherwise, the plurality is not actually voting on the same proposition.[67]

Moreover, the conditions necessary for the theorem do not always hold in judicial decisionmaking. One of the conditions of the theorem is that there be an exogenously defined correct answer.[68] Some questions that arise in legal disputes do have exogenously correct answers.[69] An example is a factual question like whether the defendant had the intent to commit the crime.[70] But many legal questions do not satisfy that criterion because the answers to those questions depend on value judgments.[71] An example is whether constitutional interpretation should turn on textualism, history, philosophy, or some other consideration—how one answers that question depends on the importance that one places on those theories.[72]

Another condition of the theorem is that none of the decision makers be identified as an expert before the decision is made.[73] An expert

66. Logrolling would not increase the odds of a worse decision in cases where the logrolling does not break a plurality—as for example, in the situation where three judges on a three-judge panel all have different views on the appropriate disposition in a case.

67. Bruce Chapman, *Rational Choice and Categorical Reason*, 151 U. PA. L. REV. 1169, 1192 n.54 (2003).

68. *See* Hessick & Jordan, *supra* note 46, at 694.

69. *See* Ronald Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057, 1060, 1081–82 (1975) ("I propose, nevertheless, the thesis that judicial decisions in civil cases, even in hard cases . . . should be generated by principle not policy.").

70. *See* Hessick & Jordan, *supra* note 46, at 694. For the view that there are correct answers in all cases, see generally Dworkin, *supra* note 69. *But see* Richard A. Posner, *The Jurisprudence of Skepticism*, 86 MICH. L. REV. 827, 875–79 (1988) (criticizing Dworkin's view).

71. *See* Hessick & Jordan, *supra* note 46, at 694.

72. *See generally* N.W. Barber, *Two Meditations on the Thoughts of Many Minds*, 88 TEX. L. REV. 807, 817–19 (2010) (book review) (discussing the limits of Condorcet's Jury Theorem in assessing nonphysical facts). Judicial decisions may conflict with other conditions of the theorem. For example, another condition of the theorem is that each decision maker makes decisions independently, and the binding nature of precedent interferes with that condition. *See* Stearns, *supra* note 64, at 148.

73. Saul Levmore, *Ruling Majorities and Reasoning Pluralities*, 3 THEORETICAL INQ. L.

increases the average competence of the group and therefore appears to make the theorem apply, but his abnormally high likelihood of getting to the correct answer may make his answer more likely to be correct even if the rest of the group disagrees with him.

A judge who feels so intensely about the correctness of a particular decision that she seeks to swap votes to achieve that decision might be an expert, at least compared to the judge with whom she swaps votes. For the other judge to have incentive to swap votes, he must not feel as intensely about the issue. That lack of intense feeling *might* translate into less expertise on the issue—though not necessarily.[74] A zealous judge may be wrong despite the strength of his convictions. But if the reason that the zealous judge has the greater conviction of correctness is that she has done more research, studied the issue more, or otherwise has some special experience with or information about the issue, then she may be an expert and more likely to be correct in her conclusion than the other judge. In that circumstance, logrolling would not be counterproductive under the theorem.

b. The Satisfaction of Intensity of Preference

One common charge against logrolling in legislatures is that it may lead to inefficient results because minority groups can use logrolling to pursue pet projects that impose high externalities.[75] Consider the following example. A city council has three members: *A*, *B*, and *C*. The council is considering two proposals, each authorizing the construction of a pipeline. One pipe connects *A*'s house to the city water system, providing a $100 benefit to *A*; the other connects *B*'s house to the city water system, providing a $100 benefit to *B*. Each pipe costs $125 to build. The total cost is thus $250, and the total benefit is $200. Without vote trading, neither proposal will pass; but logrolling will result in the construction of the two pipes, because *A* and *B* will each receive a $100 benefit yet pay only $83.

87, 89 (2002) ("The assumptions rule out the case in which the individual is an identifiable expert."); Stearns, *supra* note 64, at 130 ("The Jury Theorem posits that if each decision maker has a greater than 50% chance of selecting the correct answer and if none of the members is an expert (or if experts cannot be identified in advance), then the probability of selecting the correct answer increases along with the size of the jury.").

74. Merely feeling more confident in the correctness of an answer does not mean that the answer is more likely to be correct. Rather, the probability increases only when there is expertise to back up the confidence.

75. *See* Thomas Stratmann, *Logrolling*, in PERSPECTIVES ON PUBLIC CHOICE: A HANDBOOK 322, 324 (Dennis C. Mueller ed., 1997). Indeed, scholars have devised examples illustrating a "paradox of vote trading" where each individual has an incentive to trade, but if the trades are carried out, everyone will lose. William H. Riker & Steven J. Brams, *The Paradox of Vote Trading*, 67 AM. POL. SCI. REV. 1235, 1236 (1973).

This efficiency concern does not apply to judicial logrolling. Judges trade votes to implement what they believe is the correct version of the law. That vision of the law may or may not be efficient. It depends on what principles guide the judge's conception of the law. Judicial logrolling is agnostic with respect to content. That said, vote trading does raise an analogous concern. It may lead to less satisfaction of the intensity of preferences of judges.

Consider a modified version of the earlier example of equal protection and Article III cases. Suppose in Case 1, Judge *A* favors affirmance with intensity 3; Judge *B* opposes affirmance with intensity 1; and Judge *C* opposes affirmance with intensity 5. In Case 2, Judge *A* opposes affirmance with intensity 1; Judge *B* favors affirmance with intensity 3; and Judge *C* opposes affirmance with intensity 5.[76]

	Judge *A*	Judge *B*	Judge *C*
Affirming Case 1	3	-1	-5
Affirming Case 2	-1	3	-5

If each judge votes sincerely, Case 1 is not affirmed, and the overall level of satisfaction of intensity is 3 (-3+1+5); likewise Case 2 is not affirmed, and the overall satisfaction is 3 (1-3+5). Suppose, however, that Judges *A* and *B* trade votes. Case 1 is affirmed, and the overall satisfaction of intensity is -3 (3-1-5); similarly, Case 2 is affirmed, and the overall satisfaction of intensity is -3 (-1+3-5).

One might worry that the lower satisfaction means that the decision produced through logrolling is worse than the decision that would have been produced by sincere voting. But the concern is unwarranted. As noted above, that a preference is intense does not mean that the preference reflects a correct answer.[77] Many legal questions do not have objectively correct answers[78] (in which case the intensity of preference

76. This example assumes that judges face a binary choice to affirm or not affirm. In practice, each case presents a variety of potential outcomes. Judges therefore may agree that one outcome is incorrect yet disagree on what the correct outcome is. In Case 1, although Judge *B* and Judge *C* might agree that the lower court's judgment should not be affirmed, they might disagree on the correct outcome. Judge *B* might favor vacatur and Judge *C* might favor reversal, and Judges *B* and *C* might oppose each other's preferred outcomes as strongly, or more strongly, than they oppose affirmance.

77. It is important to note that aggregate dissatisfaction with one outcome does not establish that another outcome is preferred. Because there are more than two possible outcomes—courts can affirm, vacate, or reverse—judges can agree that one disposition is incorrect yet disagree on what the correct disposition is.

78. *See* Posner, *supra* note 70, at 891 (explaining that there can be two or more reasonable

signifies only that the judge strongly holds certain values, not that he is more likely correct). And even for those that do have correct answers, it is only if intensity is based on expertise that it correlates with correctness.[79]

Indeed, current voting practice reflects this view. Under current practice, courts do not take account of intensity of preferences; each vote of each judge counts equally. This procedure means that sometimes the aggregate satisfaction of the panel is negative (as when two judges slightly prefer affirmance and one judge strongly prefers reversal). The lack of concern that intensity satisfaction might be negative suggests that courts do not perceive high intensity to establish correctness.

In any event, not all logrolling leads to lower satisfaction. Logrolling can just as easily produce higher satisfaction, as would be the case if Judge *A* held his preference in Case 1 with intensity 8 and Judge *B* held his preference with intensity 8 in Case 2.[80] Indeed, logrolling will probably on average increase satisfaction. That is because the judge that feels most intensely about an issue is the most likely to engage in a trade. And even if a trade in two cases is not worthwhile for a judge, as with Judge *C* in the hypothetical, that judge may well be able to identify another case in which he is willing to engage in a trade.

II. TRADING VOTES TO CREATE DOCTRINE

Logrolling may also be used to garner majority support for rationales, as opposed to outcomes, that otherwise would not have majority support. For example, if Judge *A* and Judge *B* both agree on the outcomes in two cases but rely on different rationales, Judge *A* could agree to support Judge *B*'s rationale in one case in exchange for Judge *B* supporting Judge *A*'s rationale in the other. This exchange thus creates doctrine to apply in future cases.

Traditionally, creating doctrine was merely a consequence of rendering judgment.[81] Appellate courts rendered opinions simply to explain the basis for their decision, and these rationales applied to future cases to avoid the appearance of arbitrariness.[82] Today, fashioning

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outcomes).

79. *See supra* text accompanying note 73.

80. In Case 1, the overall level of satisfaction of intensity without vote trading would be -2 (-8+1+5), while with vote trading it would be 2 (8-1-5). Likewise in Case 2, the overall level of satisfaction of intensity without vote trading would be -2 (1-8+5), while with vote trading it would be 2 (-1+8-5).

81. *See* Herbert Wechsler, *The Courts and the Constitution*, 65 COLUM. L. REV. 1001, 1006 (1965).

82. Easterbrook, *supra* note 50, at 5–6 ("The court had to decide the case, and in order to show that its decision was not capricious it often had to announce a rule to govern future cases.").

doctrine has taken on a more prominent role.[83] More and more frequently, appellate courts do not confine their opinions to resolving the case before them, but instead write opinions with an eye toward providing guidance for future cases.[84] That is especially so for the Supreme Court.[85] Since gaining discretionary jurisdiction in 1925,[86] the role of the Court has been to create and clarify rules for application in future cases.[87] The Court no longer focuses on resolving disputes,[88] and indeed it routinely refuses to resolve disputes.[89] Instead, cases in the Court are simply vehicles through which the Court can articulate rules to guide future decisions. [90]

The expansion of the role of creating doctrine reflects a realization of the number of useful benefits of doctrine. Doctrine promotes stability and predictability in the law. It provides notice of what conduct is legal and what conduct is illegal, allowing those who are regulated to calibrate their conduct accordingly.[91] It similarly provides guidance to the lower courts so that they may correctly decide future cases.[92] This guidance to the lower courts also allows the lower courts to decide cases more efficiently. When a court confronts an issue for the first time, deciding a case involves a two-step process. The court first must ascertain the rule to apply in the case, and second, it must apply that rule to the facts of the case.[93] Doctrine reduces the resources that the court must spend on the first step.[94] Because the court is already

83. *See* Lisa Kloppenberg, *Measured Constitutional Steps*, 71 IND. L.J. 297, 339 (1996) ("Providing guidance on constitutional issues is a preeminent function of the federal courts, particularly the Supreme Court.").

84. *See id.* at 339–40.

85. *See id.* at 339.

86. *See* Judiciary Act of 1925, Pub. L. No. 68–415, 43 Stat. 936.

87. Easterbrook, *supra* note 50, at 6; *Address of Chief Justice Hughes at the American Law Institute Meeting*, 20 A.B.A. J. 341, 341 (1934) (stating that the role of the Court after the passage of the Act was to "secur[e] harmony of decision and the appropriate settlement of questions of general importance"); Starr, *supra* note 50, at 1364.

88. *See* Richard A. Posner, *Foreword: A Political Court*, 119 HARV. L. REV. 32, 37 (2004).

89. For example, during the 2010 Term, the Court granted review in 90 out of 7868 petitions filed. *The Statistics*, 125 HARV. L. REV. 362, 369 (2011).

90. Easterbrook, *supra* note 50, at 5. Some scholars have expanded this view, arguing that the Supreme Court has a constitutional duty and right to articulate rules for constitutional provisions. *See, e.g.*, Leonard G. Ratner, *Congressional Power over the Appellate Jurisdiction of the Supreme Court*, 109 U. PA. L. REV. 157, 160–61 (1960).

91. Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571, 597 (1987) ("The ability to predict what a decision maker will do helps us plan our lives, have some degree of repose, and avoid the paralysis of foreseeing only the unknown.").

92. Easterbrook, *supra* note 50, at 6–7.

93. HENRY HART, JR. & ALBERT SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 350–51 (1994) (discussing the stages of decision).

94. Richard H. Fallon, Jr., *Stare Decisis and the Constitution: An Essay on Constitutional*

supplied with the rule to apply, the court need only apply the rule to decide the case. The importance of providing guidance has only increased over time as the number of cases filed has increased.[95] In the past fifty years, case filings have increased tenfold.[96] The increase forces appellate courts to make quicker decisions to avoid being crushed with an overwhelming workload.[97]

Binding precedent also promotes equal treatment among those who are similarly situated.[98] The principle of equality is deeply entrenched in our culture and legal system.[99] The legitimacy of our justice system depends on like cases being decided in the same way.[100] The binding nature of precedent increases equality because it forces courts to decide future cases in the same way as past cases with similar facts.[101] Without binding precedent, different courts facing similar cases may apply different tests, resulting in different decisions despite the absence of any relevant distinction between the cases.[102]

A. *Benefits of Allowing Vote Trading on Rationales*

Allowing vote trading on rationales may produce two benefits. First, it may lead to the creation of substantively better doctrine. Second, it is likely to produce clearer doctrine that is easier for regulated individuals to follow and for lower courts to apply in future cases.

1. Producing Better Doctrine

As with trading votes on dispositions, judges have an incentive to trade votes on rationales if they think that the benefits of the trade

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Methodology, 76 N.Y.U. L. REV. 570, 573 (2001) (noting the efficiency resulting from precedent).

95. *See* Posner, *supra* note 88, at 35–37 (noting the increasing importance of the Supreme Court's role of providing guidance because of the increasing caseloads in lower courts).

96. *See* Tara Leigh Grove, *The Structural Case for Vertical Maximalism*, 95 CORNELL L. REV. 1, 51 (2009) (noting the number of cases heard at the circuit court level increased from 3,800 in 1960 to almost 30,000 in 1983).

97. *See generally Unpublished Judicial Opinions: Hearing Before the Subcomm. on Courts, the Internet, and Intellectual Prop. of the H. Comm. on the Judiciary*, 107th Cong. 22 (2002) (statement of Hon. Samuel A. Alito, Jr., J., United States Court of Appeals for the Third Circuit, and Chair, Advisory Comm. on the Federal Rules of Appellate Procedure) ("[T]he universal publication of opinions would either produce a deterioration in the quality of opinions or impose intolerable burdens.").

98. Schauer, *supra* note 91, at 595–96.

99. Henry J. Friendly, *Indiscretion about Discretion*, 31 EMORY L.J. 747, 758 (1982) (noting the "most basic principle of jurisprudence that 'we must act alike in all cases of like nature'").

100. *See id.*; *see also* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1178 (1989).

101. *See* Scalia, *supra* note 100, at 1178.

102. *See* Friendly, *supra* note 99, at 758.

exceed the costs. Erroneous doctrine has the potential to wreak much greater havoc than an erroneous ruling in a single case. An incorrect judgment affects only the case resolved by the judgment. An incorrect doctrine announced in an opinion, by contrast, may result in erroneous decisions in future cases. The extent of the damage caused by the bad doctrine depends on how often cases arise that require application of the doctrine (for example, does the issue arise only once a year, or in thousands of cases) and the magnitude of error resulting from the application of the bad doctrine (for example, does it result in the subjugation of an entire race,[103] or does it merely prevent the award of nominal damages in certain circumstances).[104]

If vote trading on rationales were allowed, a judge would have reason to trade his vote regarding the rule in one decision in exchange for another judge's vote regarding a rule in another decision *if* he concludes that the trade improves the overall state of the law: although the trade results in a bad rule in one case, it produces a good rule in another case, and the good rule is more valuable than the bad rule.[105]

For an illustration, consider again the example of the two cases involving the Equal Protection Clause and Article III standing. Suppose Judge *A* believes in strong enforcement of the Equal Protection Clause because equal treatment is important and the issue arises in many cases. He seeks the adoption of a particularly stringent doctrinal test implementing the Equal Protection Clause, but he does not have majority support for his test. Judge *B* opposes the test supported by Judge *A*, but he feels less intensely about the issue. On the other hand, Judge *B* believes it is important to limit the power of the federal judiciary under Article III and that this issue also arises in many cases. He desires the adoption of a narrow doctrinal test under Article III, but he does not have majority support for his test. Judge *A* opposes that test, but not intensely.[106] Without logrolling, Judge *A* and Judge *B* will each experience a net loss in the sense that, overall, the two decisions will produce higher error costs than if the cases had been decided the other

103. *E.g.*, Dred Scott v. Sandford, 60 U.S. 393, 452–54 (1857).

104. *E.g.*, Texas v. Lesage, 528 U.S. 18, 21 (1999).

105. Similar to our discussion about vote trades on outcomes in Part I, we limit our discussion here to the instance of a judge providing the vote necessary to create majority support for a rationale in one case in exchange for gaining majority support for a rationale in another case. But the exchange need not be between votes for rationales. A judge could trade his vote to support a rationale in exchange for another's vote to create an outcome.

106. One might argue that the level of intensity of preference for each issue is not likely to change from judge to judge—for example, that both judges will feel equally intense about Equal Protection and Article III standing. But that is not necessarily so. Judges may rank issues differently, and hold different levels of intensity of preference for each issue. Justice Thurgood Marshall, for example, likely cared more about equal protection than Article III standing, and Justice Scalia seems to have stronger views about standing than Justice Marshall did.

way. But if they exchange votes, they will both have a net gain. Both give up a little in exchange for a lot. In the view of both judges, although the trade results in erroneous decisions, trading votes will produce lower error costs on the whole.

By contrast, logrolling on rationales should not occur if either of the two judges believes that the exchange will result in greater error costs than if the exchange had not occurred. Thus, logrolling will not occur if Judge *B* feels just as strongly as Judge *A* about equal protection and just as uninterested about Article III. He loses much by sacrificing his vote in the equal protection case while gaining little in securing a majority for his view of Article III.[107]

Of course, this example oversimplifies matters. For every issue, judges may choose from an array of doctrines, and they will place different values on each doctrine. The availability of more choices gives judges more flexibility in negotiating in the logrolling. But while this flexibility complicates the analysis, it does not change the ultimate approach.

Moreover, whether an opinion articulates a substantively correct doctrine is not the only consideration that may influence a judge's decision whether to join that opinion. Another consideration is the need for guidance for future cases. Some judges may think that providing clear guidance is essential because the issue will arise frequently and lower courts will produce divergent results.[108] Those judges may be more willing to join an opinion to form a majority opinion that is binding on lower courts—that is, they will demand a lower price to join the opinion—despite believing that the doctrine announced by the decision is suboptimal. But these other considerations do not change the fact that judges will have incentives to trade when they believe the trade

107. Notice that the point here is not that logrolling maximizes the intensity of preferences of the judges; logrolling would not do so if there were a third judge who extremely intensely opposes Judge *A*'s Equal Protection test and Judge *B*'s standing test. Rather, the point is that logrolling will produce doctrines that a majority of judges think are overall superior to the doctrines that would have been produced without logrolling.

108. Consider Justice Scalia's decision to join the majority in *Arizona v. Gant*, 556 U.S. 332 (2009) (5-4 decision). There, the Court considered the situations under which the Fourth Amendment allows an officer to search an automobile incident to arrest of an occupant. *Id.* at 336. Justice John Paul Stevens, joined by three other Justices, concluded that the search should be allowed if the arrestee is within reaching distance of the vehicle during the search, or if the police have reason to believe that the vehicle contains "evidence relevant to the crime of arrest." *Id.* at 343. Four other Justices disagreed, arguing a search should be allowed following all arrests of vehicle occupants. *Id.* at 355–60 (Alito, J., dissenting). Justice Scalia took a third approach, arguing that the search should be allowed only when the officers had reason to believe the automobile had evidence of a crime. *Id.* at 353 (Scalia, J., concurring). Although Justice Scalia disagreed with the test propounded by Justice Stevens, he nevertheless joined Justice Stevens's opinion, explaining that he did so to avoid a "4–to–1–to–4 opinion that leaves the governing rule uncertain." *Id.* at 354.

will improve the substantive state of the law.

In short, permitting vote trading over rationales should improve the overall state of the law from the perspective of a majority of judges voting on the case. That perspective is important. Many legal questions do not have unique correct answers because their resolution requires value judgments or agreement on a particular methodology.[109] And for many legal questions that do have correct answers, we cannot easily discover those answers because of difficulties in gathering information.[110] The judiciary is the institution charged with providing answers in this realm of uncertainty.

2. Producing Better Guidance

Logrolling would likely increase the clarity of the doctrine that the courts announce. Under current practice, disagreements among appellate judges often result in nonbinding plurality opinions or compromise opinions that are ambiguous or vague. Logrolling would reduce the impact of disagreement on the guidance courts provide because it would allow judges to resolve their disagreements through trading votes across cases.

a. Pluralities

Under current voting protocols, a binding opinion results only when a majority agrees on the justification and those judges also support the disposition rendered by the Court.[111] Only those who vote in support of the judgment of the court count towards determining the majority that supports the opinion of the court.[112] If a plurality and a dissent agree on a test, that test is not holding if the judgment depends on a separate opinion that announces a different doctrinal test.[113]

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109. Fallon, *supra* note 26, at 57–58 ("Many constitutional questions lack answers that can be proved correct by straightforward chains of rationally irresistible arguments.").

110. William D. Araiza, *Deference to Congressional Factfinding in Rights-Enforcing and Rights-Limiting Legislation*, 88 N.Y.U. L. REV. (forthcoming 2013) (manuscript at 12), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2064890.

111. Marks v. United States, 430 U.S. 188, 193 (1977) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds . . . .'" (quoting Gregg v. Georgia, 428 U.S. 153, 169 n. 15 (1976))).

112. *See id.*

113. *See, e.g.*, King v. Palmer, 950 F.2d 771, 783 (D.C. Cir. 1991) (en banc) ("[W]e do not think we are free to combine a dissent with a concurrence to form a [holding]."); Maxwell L. Stearns, *The Case for Including* Marks v. United States *in the Canon of Constitutional Law*, 17 CONST. COMMENT. 321, 328 (2000). Courts have not always followed this rule. *See, e.g.*, Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2599 (2012) (combining the dissent and the sole opinion of Justice Roberts in stating that the "Court today *holds* that our Constitution protects us from federal regulation under the Commerce Clause so long as we abstain from

What this means is that it is more difficult to establishing a holding than to create a disposition. For a disposition, only one majority must be mustered. To establish a holding, a majority must agree not only on the disposition but also on the reason for that disposition.[114] Agreement between two judges on the outcome of a case does not establish agreement on the reasons for that outcome. Judges often form so-called "incompletely theorized agreements" under which they agree on the outcome in a case even though they disagree on the reasons for that outcome.[115] For example, two judges on a panel may agree that a statute prohibiting same-sex marriage is unconstitutional, but they may have different reasons for reaching that conclusion. One might think that the statute violates the Equal Protection Clause by discriminating against homosexuals. The other might think that the statute violates the substantive component of the Due Process Clause because marriage is a fundamental right. The agreement on outcome allows the judges to render a decision, but the decision does not produce a rule for future cases.

Incompletely theorized agreements allow appellate courts to render judgments in the face of disagreement.[116] But at the same time they undermine the rule-creation function of the court by providing a way for a majority of the court to agree on an outcome without a majority agreeing on the doctrinal reasons for the outcome.[117]

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regulated activity" (emphasis added)); Alexander v. Choate, 469 U.S. 287, 293, nn.8–9 (1985) (discussing the Court's "holding" in *Guardians Ass'n v. Civil Serv. Comm'n*, 463 U.S. 582 (1983), by combining the votes of the plurality with those of dissenters in that case); United States v. Jacobsen, 466 U.S. 109, 117–18 (1984) (deriving the holding of *Walter v. United States*, 447 U.S. 649, 659–60 (1980), by adding the concurrence of two Justices to the dissent of four Justices); Student Pub. Interest Research Grp. of N.J., Inc. v. AT & T Bell Labs., 842 F.2d 1436, 1451 (3d Cir. 1988) (deriving holding from a concurrence and dissent); *see also* Moses H. Cone Mem. Hosp. v. Mercury Const. Corp., 460 U.S. 1, 17 (1983) (stating that "the Court of Appeals correctly recognized that the four dissenting Justices and Justice Blackmun formed a majority to require application of the *Colorado River* test").

114. Indeed, this understates the possibility of disagreement. Unlike outcomes, justifications potentially have many levels of generality, and judges may disagree on any of those levels. For example, they may disagree on the fundamental principles at stake in a case, on the doctrine to implement those principles, or on the application of that doctrine in a particular case. *See* Cass R. Sunstein, *Incompletely Theorized Agreements*, 108 HARV. L. REV. 1733, 1739–40 (1995) (describing how people may agree on outcomes but disagree on the reasoning).

115. *Id.* at 1735–36.

116. *Id.* at 1746 ("[Incompletely theorized] agreements have the large advantage of allowing a convergence on particular outcomes by people unable to reach anything like an accord on general principles."). Incompletely theorized agreements in the courts may have other benefits as well, such as saving time and resources in crafting decisions and avoiding embroiling courts in social reform. *See id.* at 1746–54.

117. *E.g.*, CTS Corp. v. Dynamics Corp. of Am., 481 U.S. 69, 81 (1987) ("As the plurality opinion . . . did not represent the views of a majority of the Court, we are not bound by its reasoning.").

Van Orden v. Perry provides an example.[118] The issue in that case was whether a monument displaying the Ten Commandments outside the Texas state capitol violated the Establishment Clause.[119] A plurality of four Justices concluded that the monument was permissible because it was consonant with our Nation's history and tradition of acknowledging the Ten Commandments in government buildings.[120] Justice Stephen Breyer concurred in the judgment.[121] He rejected the plurality's historical approach, instead arguing that the dispositive inquiry should be whether the display is socially divisive.[122] Because no rationale commanded a majority of the Court, the Court's decision in *Van Orden* did not establish a doctrinal test for resolving Establishment Clause cases. [123]

Van Orden is by no means unique. In the last thirty years, the Supreme Court has issued over two hundred plurality opinions,[124] issuing four more in the last Term.[125] The circuit courts have issued many more. Several Justices have remarked that this high rate of plurality opinions is unacceptable because those opinions fail to provide guidance.[126]

To be sure, some guidance can sometimes be gleaned from plurality decisions. Under prevailing norms, split opinions will produce a holding if the narrowest ground of decision articulated by one of the concurring

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118. 545 U.S. 677 (2005).

119. *Id.* at 681.

120. *Id.* at 688–92.

121. *Id.* at 698 (Breyer, J., concurring in the judgment).

122. *Id.* ("They seek to avoid that divisiveness based upon religion that promotes social conflict, sapping the strength of government and religion alike.").

123. Indeed, the Supreme Court has consistently failed to agree on a single test for resolving Establishment Clause cases. *See, e.g.*, Drew G. Stark, Note, *God in the Deductions: Tax Deductions for Religion and the Future of Taxpayer Standing for Establishment Clause Challenges*, 39 HASTINGS CONST. L.Q. 893, 893 (2012) (noting at least four different tests that Justices have proposed).

124. *See* James F. Spriggs II & David R. Stras, *Explaining Plurality Decisions*, 99 GEO. L.J. 515, 519 (2011) (finding that from 1953 to 2006, the Court issued 195 plurality opinions); Mark I. Levy, *Plurality Opinions*, NAT'L L.J., Feb. 12, 2007, at 13 (finding over 200 plurality opinions between 1977 and 2007).

125. Coleman v. Court of Appeals of Maryland, 132 S. Ct. 1327 (2012) (plurality, with Thomas, J., concurring in the judgment); Williams v. Illinois, 132 S. Ct. 2221 (2012) (plurality, with Breyer, J., concurring in the judgment); Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012) (plurality, with Justice Ginsburg concurring in the judgment); United States v. Alvarez, 132 S. Ct. 2537 (2012) (plurality, with Breyer, J., concurring in the judgment). According to Spriggs and Stras, pluralities tend to result more often in constitutional cases presenting hot button issues that divide society. *See* Spriggs & Stras, *supra* note 124, at 547.

126. *See* Ruth Bader Ginsburg, *Remarks on Writing Separately*, 65 WASH. L. REV. 133, 148–49 (1990); Lewis F. Powell, Jr., *Stare Decisis and Judicial Restraint*, 47 WASH. & LEE L. REV. 281, 289 (1990); William H. Rehnquist, *Remarks on the Process of Judging*, 49 WASH. & LEE L. REV. 263, 270 (1992).

judges necessary to constitute a majority has the assent of a majority of judges that also support the outcome.[127] Thus, for example, suppose the plurality in a case concludes that the Free Exercise Clause prohibits the government from intentionally discriminating against a religion, and a concurrence in the judgment states that the government violates the Clause by even accidentally discriminating against religion. In that situation, the holding of the case is that the Free Exercise Clause prohibits intentional discriminating. That test states the narrowest ground of decision on which a majority of judges supporting the judgment agree. But this test has proven difficult to apply for many cases, because of disagreement about what constitutes the narrowest ground of decision or whether there is a narrowest ground of decision at all.[128]

Permitting vote trading on rationales would, on the whole, reduce plurality opinions and the uncertainty that comes from those opinions. Vote trading would allow judges in the plurality to secure majority support for their opinions, transforming the reasoning in those opinions into binding doctrine. [129]

b. Compromise Opinions

Disagreement among judges, of course, need not lead to separate opinions. Disagreeing judges may resolve their disagreement by settling on an opinion that accommodates both their views.[130] These compromises also may undermine the appellate court's role of providing guidance through its opinions.[131]

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127. Marks v. United States, 430 U.S. 188, 193 (1977) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." (internal quotation marks omitted)).

128. Grutter v. Bollinger, 539 U.S. 306, 325 (2003) (stating that the "test is more easily stated than applied" in highlighting disagreements among application); Nichols v. United States, 511 U.S. 738, 745 (1994) (noting the disagreements arising in applying the test to Baldasar v. Illinois, 446 U.S. 222 (1980)); *see also* Rapanos v. United States, 547 U.S. 715, 758 (2006) (Roberts, C.J., concurring) (arguing that *Marks* may be difficult to apply to *Rapanos*, which produced a plurality and concurrence in the judgment). *See generally* Joseph M. Cacace, Note, *Plurality Decisions in the Supreme Court of the United States: A Reexamination of the* Marks *Doctrine After* Rapanos v. United States, 41 SUFFOLK U. L. REV. 97, 101 (2007) (recounting some of the difficulties in applying *Marks*).

129. This is not to say that the vote trades must be motivated by a desire to reduce uncertainty in the law. A judge might seek majority support for an opinion because he thinks it is correct, not to provide guidance to lower courts. But even in that case, logrolling would reduce uncertainty in the law because of the reduction in instances of judges writing separate concurrences in the judgment.

130. Rehnquist, *supra* note 57, at 643 ("While of necessity much latitude is given to the opinion writer, there are inevitable compromises.").

131. Of course, not all opinions reflect compromise. Judges on a panel may share similar views on the issue in a particular case. Moreover, judges often join opinions with which they

For instance, a compromise may result in an opinion that endorses different, disparate legal rationales. Finding examples requires reading tea leaves because opinions do not state that they are endorsing contradictory views. But one good candidate is *Gall v. United States*.[132] There, the Supreme Court rejected a requirement that district courts imposing sentences that departed from the Sentencing Guidelines offer justifications that are "proportional" to the size of the departures.[133] At the same time, however, the Court stated that "a major departure should be supported by a more significant justification than a minor one."[134] One possible explanation for this contraction is that it was the product of a compromise. Both Justices Scalia and Breyer joined the *Gall* majority,[135] but they have extremely divergent views on the appropriateness of requiring proportionality justifications for departures because proportionality tends to establish the Guidelines as mandatory. Justice Scalia has suggested that, because it tends to make the guidelines mandatory, departures based on proportionality present constitutional problems;[136] by contrast, proportionality review presents no constitutional problem for Justice Breyer because he has indicated his view that the Guidelines should continue to be mandatory.[137] The contradictory language might have been the result of an effort to placate both constituencies to ensure a majority. But it resulted in an ambiguous opinion that did not clearly specify a legal test for future cases.[138]

Compromise may also result in an extremely narrow opinion—a so called minimalist opinion—that provides less guidance for future cases.[139] Judges who disagree about the rule that should control the case

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have some minor disagreement without demanding changes. A judge might do so to avoid unnecessary conflict, to preserve resources, to promote a sense of collegiality, and to encourage the author of the draft opinion to demonstrate similar cooperation in the future. Caldeira & Zorn, *supra* note 58, at 877; Caminker, *supra* note 6, at 2332; Cross, *supra* note 9, at 1416. But when the disagreement is substantial, the judge is likely to write separately or demand alterations in the opinion to accommodate his views.

132. 552 U.S. 38 (2007).

133. *Id.* at 46.

134. *Id.* at 50.

135. *Id.* at 39.

136. *Id.* at 60 (Scalia, J., concurring).

137. United States v. Booker, 543 U.S. 220, 326 (2005) (Breyer, J., dissenting).

138. *Booker* is another example of a compromise decision that relied on contradictory principles. There, one majority coalition voted to render the Sentencing Guidelines non-mandatory, *see id.* at 233, and another majority coalition voted to require that courts still use the Guidelines as the baseline in imposing sentence, *see id.* at 250. As others have noted, that remedy is in tension with the substantive decision to render the Guidelines advisory. *See* Frank O. Bowman, III, *Debacle: How the Supreme Court Has Mangled American Sentencing Law and How It Might Yet Be Mended*, 77 U. CHI. L. REV. 367, 441 (2010).

139. An opinion may be narrow in two ways. It may be narrow in breadth, which means that it applies to only a few factual situations. Opinions that announce standards fall into this category. Or it may be shallow, which means that the opinion does not have a deep theoretical

agree to a second-best standard that can accommodate their divergent views in future cases. Consider a case about whether an employer must provide notice to an employee before termination. Both Judge *A* and Judge *B* believe that the issue should be controlled by a rule. But Judge *A* prefers a rule prohibiting the termination of an employee without thirty days' notice, while Judge *B* prefers a rule allowing termination with only five days' notice. They compromise by adopting a standard that "reasonable notice" is required before termination. Neither judge thinks that the standard is optimal. But Judge *A* agrees to the standard in the hopes that the Court will hold in a future case that a termination without thirty days' notice is unreasonable as a matter of law; Judge *B*, by contrast, agrees on the hope that a future case will hold that only five days' notice is usually reasonable notice.

That Judge *A* and *B* both believe that the standard can produce the results they desire demonstrates that the standard does not provide broad guidance for future cases.[140] It does provide some guidance—courts will apply a reasonableness test instead of some other standard—but less guidance than either Judge *A*'s or Judge *B*'s rule.[141] Rules provide more guidance because they specify *ex ante* what conduct is illegal[142] and provide bright lines about what conduct is illegal.[143] Individuals and courts can relatively easily assess whether particular conduct is permitted under a rule.[144] Standards, by contrast, do not specify beforehand whether particular conduct is illegal; rather, they gain content through judicial application after the conduct has occurred.[145] They consequently are less predictable and more difficult

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foundation. Shallowness matters because no two cases are exactly alike. Providing reasons for a doctrine allows lower courts to determine whether to expand that doctrine to cover future cases that present a different set of facts. A decision that is theoretically shallow leaves lower courts guessing about whether a doctrine should be expanded or confined to the facts of the case in which it was announced. *See generally* Cass R. Sunstein, *Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 28 (1996) (discussing ways in which a decision might be minimalist).

140. Not all standards provide equal amounts of guidance. The standard of reasonableness, for example, is substantially nuanced and well defined because of the large body of case law defining it. By contrast, the standard of proper and just is less well defined because there is not a comparable body of cases defining it. Cass R. Sunstein, *Problems with Minimalism*, 58 STAN. L. REV. 1899, 1911 (2006).

141. Fallon, *supra* note 26, at 81 (describing the problems with "case-by-case judicial balancing").

142. *See* Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 571–76 (1992) (discussing the benefits of *ex ante* rules).

143. Scott Dodson, *The Complexity of Jurisdictional Clarity*, 97 VA. L. REV. 1, 15–20 (2011).

144. Not all rules provide equal amounts of guidance. A narrow rule that applies to only a few cases provides less guidance than a broad one that applies to many circumstances. Sunstein, *supra* note 140, at 1911. This is not to say that broad rules are always better. Broad rules increase the incidents of error if the rule itself is erroneous. *See id.*

145. Cass R. Sunstein, *Problems with Rules*, 83 CALIF. L. REV. 953, 965 (1995) ("The

for lower courts to administer.[146] This is not to say that standards are the only means to narrow an opinion. Judges may narrow an opinion by fashioning a rule that applies only to the case at hand, without providing guidance for how or whether that rule should be extended in future cases.[147]

In its most extreme form, compromise may lead to disagreeing judges tailoring the opinion so that it does not create any doctrine applicable outside the specific case at hand. Identifying specific examples of this phenomenon is difficult to do, because courts generally do not disclose whether the decision to confine a decision to the facts of the case was the product of disagreement among the judges or of a substantive conclusion that a minimalist decision is preferable because of the inability to identify a suitable test for future cases. But one possible example is *Bush v. Gore*.[148] There, the Supreme Court concluded that the procedure established by the Florida Supreme Court for the recount of votes in the 2000 presidential election violated the Equal Protection Clause.[149] In so concluding, the Court explained that its conclusion was "limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities."[150] But one of the Justices joining the majority was Justice Scalia, who has made clear that he does not think that the Court should create doctrines that are limited to the facts of the case.[151] His willingness to join the opinion despite its failure to articulate a broader test may reflect the fact that the other Justices in the majority did not agree with the test he would have proposed.

To be sure, although minimalist decisions provide less guidance for future cases, they are sometimes preferable to non-minimalist decisions. Appellate courts cannot foresee every future case, and adopting a broad, rigid rule therefore may lead to unanticipated bad consequences.[152] A minimalist opinion that is narrow in scope or that announces a flexible standard affords the lower courts greater discretion to avoid these undesirable results.[153]

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meaning of a standard depends on what happens with its applications.").

146. *Id.* ("With a standard, it is not possible to know what we have in advance.").

147. *See* Tushnet, *supra* note 8, at 497, n.15 (speculating that the narrow decision in Arbaugh v. Y & H Corp., 546 U.S. 500 (2006), was the product of compromise).

148. 531 U.S. 98 (2000).

149. *Id.* at 103.

150. *Id.* at 109.

151. *See* Scalia, *supra* note 100, at 1179–81 (criticizing tests that do not apply to future cases).

152. Sunstein, *supra* note 140, at 1914 (arguing that minimalist decisions are appropriate for "questions [that] are unlikely to come up often and require answers about which the Court cannot always be confident").

153. Kathleen M. Sullivan, *The Supreme Court, 1991 Term-Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 58–59 (1992) ("Standards allow for the decrease of

Whether a court should adopt a rule or a standard or a minimalist or non-minimalist decision depends on the precise case before the court.[154] When a court lacks information about the issues that may arise in future cases because, for example, the court is addressing a new area of law, and consequently cannot predict the impact of a broad ruling, a minimalist decision may be preferable.[155] The case-by-case incremental growth of the law avoids the risk of causing errors in future unanticipated cases. By contrast, when an issue occurs frequently in the lower courts and there is a risk that the lower courts will rule inconsistently on that issue, a non-minimalist decision announcing a rule is preferable. Such a decision will increase the predictability of law, decrease the cost of decisionmaking, potentially increase equal application of the law, and decrease the incidents of erroneous decisions because the lower court may derive the incorrect doctrine to apply in a particular case.[156] Moreover, a non-minimalist decision may become preferable to a minimalist one over time. As a court gains more information, and as more cases arise before the lower courts, the appellate courts may determine that the advantages of creating a broader opinion outweigh the costs.[157] Indeed, this benefit of additional information may be one of the reasons that the Supreme Court generally waits for the development of a mature circuit split before resolving an issue.[158] The additional cases provide more information so that the Court may announce rules of appropriate scope.[159]

Although non-minimalist opinions are sometimes preferable to minimalist ones, compromises lead to the over production of minimalist opinions, because a minimalist opinion is often the best way to accommodate the views of disagreeing judges. Thus, even when all judges agree that a non-minimalist opinion would be preferable because the issue arises frequently and clear guidance is necessary, the inability

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errors of under- and over-inclusiveness by giving the decision maker more discretion than do rules.").

154. Sunstein, *supra* note 140, at 1914–15 (arguing that minimalism is not always appropriate in constitutional cases).

155. *Id.* at 1915.

156. *Id.* Professor Fallon has argued that the Court actually strives to produce rules instead of standards, based on the conclusion that standards "are insufficiently law-like." Fallon, *supra* note 26, at 76.

157. *See* Miller v. California, 413 U.S. 15, 24 (1973) (creating a standard for pornography to avoid the costs resulting from the Court's past practice of review on a case-by-case basis).

158. Ashutosh Bhagwat, *Separate but Equal?: The Supreme Court, the Lower Federal Courts, and the Nature of the "Judicial Power,"* 80 B.U. L. REV. 967, 979–80 (2000) (noting that the Court sometimes takes the need for percolation into account when deciding whether to grant certiorari).

159. Todd J. Tiberi, *Supreme Court Denials of Certiorari in Conflicts Cases: Percolation or Procrastination?*, 54 U. PITT. L. REV. 861, 865 (1993) (explaining that percolation may allow the Court to gather more information to generate better legal rules).

to agree on a non-minimalist rule may lead to a minimalist standard.

Logrolling would provide a means for achieving compromise without diluting or minimizing an opinion. Judges who disagree on the rationales in two cases could trade votes; one judge would support the rationale of the other judge in one case in exchange for that judge's support of the first judge's rationale in another case. The result would be two clear opinions instead of two watered-down ones.

To be sure, logrolling would not prevent all compromises in opinions. A judge may be willing to compromise to some extent in order to lower the price that the other judge charges to join the opinion. But there will be some cases where judges will be willing to trade votes without compromise. Logrolling should therefore increase clarity of the law and the quality of legal rules overall.

B. *Reasons Against Allowing Vote Trading on Rationales*

Several of the objections that apply to vote trading on outcomes apply to vote trading on rationales as well. For example, there are the same concerns that logrolling violates ethical norms and that logrolling would undermine equality among judges. But the same responses to those objections, *mutatis mutandis*, apply in the context of vote trading on rationales. The need for compromise in creating majority support for opinions is inevitable,[160] and each judge has equal influence in each case because each judge has equal voting power on each opinion.[161] At the same time, some of the concerns with vote trading on outcomes do not apply to vote trades on rationales. For example, vote trading on opinions does not raise the concern that judges are deciding cases based on something other than application of the law. Fashioning doctrine does not involve deciding cases according to law; doctrine is the instrument through which law is implemented.[162]

Moreover, vote trading on rationales raises its own set of objections. For example, one might argue that logrolling of this sort may violate norms against judges joining opinions with which they disagree. Another objection is that logrolling of this sort will reduce the quality of opinions. These objections are considered below.

1. The Norm of Voting for Rationales

One might argue that a judge should support only those doctrines that best reflect his views and that supporting an opinion through

160. *See supra* notes 50–57 and accompanying text.

161. *See supra* notes 58–63 and accompanying text.

162. For example, the strict scrutiny test for evaluating statutes that discriminate on the basis of viewpoint discrimination does not derive from application of the First Amendment. Instead, the test is the means that the courts have developed to determine whether a statute complies with the First Amendment.

logrolling is inconsistent with this practice. But judges have no such obligation. Indeed, judges frequently join opinions announcing doctrines with which they disagree. They often acquiesce in the views of the judge drafting the majority opinion because they do not have the time to write separately or out of concerns about collegiality.[163] Indeed, until the late nineteenth century, acquiescence in the views of others was the usual practice.[164] Likewise, judges regularly defer to the legal analysis of other institutions, including agencies, legislatures, and other courts, based on extralegal considerations such as expertise and efficiency. Moreover, judges routinely compromise in fashioning majority opinions. When two judges disagree on doctrine, each judge abandons his preferred position, producing an opinion that does not accurately reflect either judge's legal position.[165]

A more sophisticated objection is that judges should not consider other cases in fashioning legal doctrine; instead, they should focus only on the case before them. But this objection is inconsistent with current practice. Judges regularly consider possible future cases in fashioning a rule of law, as the hypothetical questions asked at oral argument demonstrate. Similarly, they often consciously craft doctrine in a way that allows lower courts to apply the doctrine more easily in future cases.[166]

Even more related to logrolling, judges sometimes modify the doctrine in one area of the law because of doctrine in another area of law. As a number of scholars have argued, courts develop substantive and jurisdictional rules based on the remedial rule that will apply.[167] Thus, for example, based on the belief that the exclusionary rule is too

163. RICHARD A. POSNER, HOW JUDGES THINK 32 (2008); Lee Epstein, William M. Landes & Richard A. Posner, *Why (and When) Judges Dissent: A Theoretical and Empirical Analysis*, 3 J. LEGAL ANALYSIS 101, 104 (2011).

164. G. Edward White, *The Internal Powers of the Chief Justice: The Nineteenth-Century Legacy*, 154 U. PA. L. REV. 1463, 1471, 1504–05 (2006).

165. One might argue that when a judge joins a majority opinion because it has been altered to accommodate his views, he does not disagree with that majority opinion; rather, it simply does not reflect his ideal view of the law. By contrast, with logrolling, the judge is joining an opinion announcing a doctrine with which he may disagree. But this distinction does not make a difference. If one believes that a judge has an obligation to decide according to his best legal views, compromising by joining a majority opinion undermines that obligation just as much as joining an opinion with which the judge disagrees because the compromising judge does not completely agree with the doctrine announced in the opinion he joins.

166. Richard H. Fallon, Jr., *Judicially Manageable Standards and Constitutional Meaning*, 119 HARV. L. REV. 1275, 1305–06 (2006) (arguing that the Supreme Court adopted the *Miranda* doctrine to improve administrability).

167. *See* Richard H. Fallon, Jr., *The Linkage Between Justiciability and Remedies—and Their Connections to Substantive Rights*, 92 VA. L. REV. 633, 635 (2006); Paul Gewirtz, *Remedies and Resistance*, 92 YALE L.J. 585, 678–79 (1983); Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 889–99 (1999).

extreme a remedy, some courts have pared down the substantive scope of the Fourth Amendment and *Miranda v. Arizona*.[168] These changes in substantive law may not reflect a judge's preferred version of the law. A judge may prefer, for example, broad Fourth Amendment rights, but a remedy less severe than exclusion. His vote to narrow the Fourth Amendment is a second best option given the exclusionary rule. The modification of the legal rule reflects the judge's effort to fashion the best body of law given the circumstances. The same can be said about logrolling. Logrolling is also designed to produce the best body of law. A judge will trade votes on doctrine only if she believes that the gains from the doctrine that she purchased through the trade exceeds the losses from the doctrine that she supported in exchange.

2. Quality of Opinions

Just as one might worry that logrolling on outcomes would reduce the quality of decisions, one might also worry that trading votes on rationales might reduce the quality of opinions. There are three arguments. The first two are similar to the arguments against vote trading on outcomes: vote trading on rationales will produce worse doctrine under Condorcet's Jury Theorem because it results in the adoption of a doctrine that a majority of judges initially rejected, and it may produce rationales that are worse because they are less satisfying to the judges overall than would have resulted from sincere voting. The third argument is that one reason for assigning cases to multiple judges is to dampen the influences of individual judges, and logrolling undermines that structural protection.

a. Condorcet's Jury Theorem

Similar to the concern with logrolling on outcomes, one might think that logrolling on rationales will produce worse opinions under Condorcet's Jury Theorem because logrolling may result in the court adopting an opinion that a minority of judges support. But that risk is not significant. For one thing, the same response that was given in the previous part applies to this concern: a judge who is willing to trade votes to secure a particular doctrine might be an expert whose opinion is more likely to be correct than the other judge.

More important, as noted above, the theorem applies only to problems that have an exogenously defined correct answer.[169] But there is reason to think that there is no single exogenously correct way to fashion doctrine.[170] Developing doctrine requires judges to make value

168. Levinson, *supra* note 167, at 867 (noting the impact of the exclusionary rule on remedies).

169. *See supra* note 68 and accompanying text.

170. *See* Posner, *supra* note 70, at 876; *see also* Posner, *supra* note 88, at 40–41 (arguing

judgments about the relative weight to put on a number of considerations such as the text of the applicable law, the motivation behind the law, and the social costs of a particular interpretation.[171] Society has not agreed upon a single correct way to balance these considerations, as is evident from the persistent disagreements about, for example, the appropriate method of interpretation[172] and how to balance individual rights and government interests.[173]

b. Preference Intensity

As with logrolling on outcomes, vote trading on rationales may result in lower aggregate satisfaction of judges in some cases. Again, the two cases involving the Equal Protection Clause and Article III standing provide an illustration. Suppose in Case 1 Judge *A* moderately supports a strict equal protection test, Judge *B* weakly opposes that test, and Judge *C* strongly opposes that test. In Case 2, Judge *B* moderately supports a narrow standing test under Article III, Judge *A* weakly opposes that test, and Judge *C* strongly opposes that test. Without vote trading, the court will reject the strict equal protection and the narrow standing tests, and will produce high aggregate overall satisfaction of the judges' preferences (because one judge's support for each test was only moderate in each example, while one of the judges opposed to the test had strong opposition in each example). With vote trading, Judges *A* and *B* may trade votes resulting in the adoption of the strict equal protection and the narrow standing tests. That trade will produce lower overall satisfaction because the judges with moderate support prevail, but those with strong opposition lose.

But this possible reduction in aggregate intensity satisfaction will not result in worse doctrines. To start, logrolling does not systemically result in lower satisfaction of preferences.[174] To the contrary, because logrolling allows judges to concentrate their voting power on producing

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that there is no single correct answer in constitutional cases).

171. *See generally* Fallon, *supra* note 26, at 150 ("Shaping doctrine successfully requires an acute sense of institutional, sociological, and psychological dynamics, as well as good judgment about how to balance competing values."); Kathryn A. Sabbeth & David C. Vladeck, *Contracting (Out) Rights*, 36 FORDHAM URB. L.J. 803, 835–36 (2009) ("[A]ll law, whether statutory or based on common law, reflects value judgments.").

172. *Compare, e.g.*, DWORKIN, LAW'S EMPIRE, *supra* note 45, at 238–41 (advocating model of moral interpretation), *with* Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 862 (1989) (advocating originalism), *and* STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION 5–6 (2006) (stating that interpretation must be informed by contemporary values).

173. *Compare, e.g.*, Grutter v. Bollinger, 539 U.S. 306, 328 (2003) (finding government had sufficient interest to warrant affirmative action), *with id.* at 378–79 (Rehnquist, C.J., dissenting) (finding that interest insufficient).

174. *Cf.* Hasen, *supra* note 15, at 1333–34 (making an analogous point on whether legislative logrolling decreases efficiency).

doctrines that they care most about, it often increases the aggregate satisfaction of judges. That would be the case if, for example, Judge *A* felt extremely intensely about the equal protection test, and Judge *B* felt extremely intensely about the standing test, while Judge *C*'s opposition to both was minor.

Indeed, if one is concerned that the quality of an opinion may be tied to the level of preference satisfaction, allowing logrolling improves the system because it takes account of intensity of preference. Under current voting protocols, a judge's voting power does not change the intensity of preference. A judge who feels very strongly about an issue has no greater influence than a judge who feels rather indifferent to that issue.

In any event, a higher degree of preference satisfaction will not, standing alone, produce a more "correct" doctrine. As noted earlier, for any given issue, there is no single correct doctrinal test.[175] How a court fashions doctrine depends on how it balances a variety of interests, and reasonable people may disagree on the best way to strike that balance.[176] This is not to say that all doctrinal tests are correct. Judges are constrained by the text of a law, theories of interpretation, social norms, and the desire to ensure that the public accepts their doctrines.[177] Logrolling should not result in the adoption of doctrines that do not meet these constraints because the other judges will charge too high a price (perhaps an infinite price) to join such unjustifiable positions.

c. Structural Protections

A separate objection is that logrolling will tend to produce more errors in future cases. The argument runs as follows. The process of obtaining agreement among judges on a panel tends to result in minimalist opinions because each judge on the panel will have a different set of values and preferences. Minimalist opinions pose less risk of error in future cases than broad ones because the latter may cause unanticipated, serious errors in future cases. Logrolling undermines this mechanism for promoting minimalism and therefore raises the potential for error in future cases.

Even if it is true that logrolling results in more errors, the increase in certainty may offset those costs. Uncertainty in the law itself produces costs as parties have to proceed cautiously to avoid violations. Even if the substance of the law is suboptimal, clarity in the law allows parties to calibrate their behavior to avoid those costs. Indeed, judges have joined decisions with which they disagree for precisely this reason. In

175. *See supra* notes 169–73 and accompanying text.

176. Richard A. Posner, *The Role of the Judge in the Twenty-First Century*, 86 B.U. L. REV. 1049, 1053 (2006).

177. *Id.* at 1054.

Arizona v. Gant,[178] for example, Justice Scalia joined a plurality opinion outlining the situations under which an officer may search an automobile incident to arrest of an occupant. Although Justice Scalia stated that he disagreed with the rule, he explained that he was joining the plurality to avoid a "4–to–1–to–4 opinion that leaves the governing rule uncertain."[179]

But it is not always true that minimalist opinions reduce the risk of error in future cases. As noted earlier, minimalist opinions may actually increase the risk of error because they do not provide enough guidance; whether a court should issue a minimalist or non-minimalist decision depends on which set of costs is higher—the costs of error from an overly broad rule, or the costs from lack of guidance—and those costs will vary from issue to issue.[180]

Of course, judges do not always agree whether a minimalist decision or a non-minimalist decision will produce higher costs. One may believe a broad rule is called for, and another may think that a narrow opinion is preferable. Under current procedures of requiring agreement among judges, the minimalist opinion automatically prevails, since the minimalist decision is the extent of agreement. Logrolling provides judges with the option of agreeing on the broader decision. It therefore will reduce overall errors in some instances. There of course may be instances when logrolling produces broader opinions than is optimal. But it is hard to say that those costs exceed the benefits of the opportunities for broader opinions when they are preferable to minimalist opinions.

III. LOGROLLING TO FORM SUPERMAJORITIES

Logrolling may be used to bolster support for a decision that already enjoys majority support. A judge in the majority could purchase the vote of a disagreeing judge by giving up a vote in another case. This exchange would not change the outcome or rationale in a case; instead, the reason for this exchange would be to increase the perceived support of the decision.[181]

178. 556 U.S. 332 (2009) (5–4 decision).

179. *Id.* at 354 (Scalia, J., concurring); *see also* Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting) (stating that for cases involving statutes "it is more important that the applicable rule of law be settled than that it be settled right").

180. *See supra* notes 154–59 and accompanying text.

181. Of course, supermajorities formed through logrolling may have less weight because the coalition is a result of bargaining instead of each judge independently concluding that the decision is correct. But the perception may also be that presenting a strong majority was important enough to the judges that they were willing to negotiate to achieve that supermajority.

A. *Benefits of Logrolling to Form Supermajorities*

Increasing the size of the majority may add more weight to the decision simply because the majority is larger. As the size of the majority increases, the decision may be more likely to be viewed as being correct, definitive, powerful, legitimate, and worthy of compliance.[182] A decision rendered by a 7–2 vote on the Supreme Court may garner more respect than a 5–4 decision.[183] Supermajority opinions may also help depoliticize issues. Many contentious issues generate decisions that divide along partisan lines. Forming a supermajority that crosses party lines may reduce the perception that a decision is partisan and outcome-oriented.[184] These effects are most often discussed in the context of unanimous opinions.

According to many scholars and judges, divided decisions undermine the authority of the Court by creating the impression that decisions are the product of the views of individual judges, not of the views of the Court as an institution.[185] Moreover, by attacking the reasoning of the majority, separate opinions may give the sense that the opinion of the Court is unjustifiable, when it may be the product of perfectly justifiable, but different, views held by the majority.[186] For

182. *See* Meredith Kolsky, Note, *Justice William Johnson and the History of the Supreme Court Dissent*, 83 GEO. L.J. 2069, 2087–88 (1995).

183. *See, e.g.*, Ricci v. DeStefano, 557 U.S. 557, 623 (2009) (Ginsburg, J., dissenting) (criticizing a change in the law by "a bare majority of th[e] Court"); United States v. Watts, 519 U.S. 148, 165–66 (1997) (Stevens, J., dissenting) (challenging the strength of McMillan v. Pennsylvania, 477 U.S. 79 (1986), in part, because it was a "5–4 decision"); Payne v. Tennessee, 501 U.S. 808, 844 (1991) (Marshall, J., dissenting) (criticizing South Carolina v. Gathers, 490 U.S. 805 (1989), on the ground that it was decided by a 5–4 vote); *see also* Ginsburg, *supra* note 126, at 142 (suggesting that "[c]oncern for the well-being of the court on which one serves, for the authority and respect its pronouncements command, may be the most powerful deterrent to writing separately").

184. *See* SHELDON GOLDMAN & CHARLES M. LAMB, JUDICIAL CONFLICT AND CONSENSUS: BEHAVIORAL STUDIES OF AMERICAN APPELLATE COURTS 1 (1986); *see also* Mark A. Graber, *Desperately Ducking Slavery:* Dred Scott *and Contemporary Constitutional Theory*, 14 CONST. COMMENT. 271, 289 n.82 (1997) (noting that Justice Robert Grier "joined the *Dred Scott* majority, in part, because he thought having a Northern justice support the result would make that decision more acceptable to that region").

185. *See, e.g.*, LEARNED HAND, THE BILL OF RIGHTS 72 (1958) (stating that a dissent "cancels the impact of monolithic solidarity on which the authority of a bench of judges so largely depends"); JEFFREY ROSEN, THE SUPREME COURT: THE PERSONALITIES AND RIVALRIES THAT DEFINED AMERICA 224, 226 (2007) (recounting Chief Justice Roberts's view that divided decisions result in a "jurisprudence of the individual" instead of a "jurisprudence of the Court," which will lead people to "identify the rule of law with how individual justices vote"); William J. Brennan, Jr., *In Defense of Dissents*, 37 HASTINGS L.J. 427, 432–33 (1986) (noting Chief Justice Marshall's efforts to produce unanimous opinions to give an impression that judgments were the product of the Supreme Court and not one justice); Alex Simpson, Jr., *Dissenting Opinions*, 71 U. PA. L. REV. 205, 217 (1923).

186. Defenders of Wildlife v. EPA, 450 F.3d 394, 402–06 (9th Cir. 2006) (Berzon, J.,

these reasons, as is commonly told,[187] Justices of the Supreme Court worked hard to produce unanimous opinions in sensitive cases such as *United States v. Nixon*[188] and *Brown v. Board of Education.*[189]

Whether supermajorities and unanimity actually provide these benefits is not entirely clear. Despite unanimity, for example, the Court's decree in *Brown* was repeatedly disobeyed.[190] And the legitimacy of the Court did not crumble when it issued its decision divided along partisan lines in the highly contentious case of *Bush v. Gore*.[191] But many judges and scholars have concluded that the benefits are real, and have argued that judges should work to reduce dissent.[192]

In any event, forming a supermajority likely entails the same sorts of compromise as forming a majority for a decision. Unless a judge who disagrees with the majority believes that producing a supermajority is so important that he should join the majority despite his disagreement, that judge will join the majority only if the opinion is modified to be consistent with his views.[193] Efforts to achieve supermajorities therefore may overly narrow or obscure opinions.[194]

Logrolling facilitates the formation of supermajority coalitions. It provides a means for courts to form these coalitions in cases where it otherwise may be difficult, if not impossible, to do so because there is no overlap, or extremely little overlap, between the various judges'

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concurring in the order denying the petition for rehearing en banc); Brennan, *supra* note 185, at 429 (noting that Justice Stewart described dissents as "subversive literature").

187. *See, e.g.*, Michael Abramowicz & Maxwell L. Stearns, *Beyond Counting Votes: The Political Economy of* Bush v. Gore, 54 VAND. L. REV. 1849, 1937 n.322 (2001).

188. 418 U.S. 683, 685 (1974).

189. 347 U.S. 483 (1954), supplemented *sub nom.* Brown v. Bd. of Educ. of Topeka, Kan., 349 U.S. 294 (1955).

190. GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 52 (1991) ("Despite the unanimity and forcefulness of the *Brown* opinion, the Supreme Court's reiteration of its position and its steadfast refusal to yield, its decree was flagrantly disobeyed.").

191. *See* James L. Gibson, *The Legitimacy of the U.S. Supreme Court in a Polarized Polity*, 4 J. EMPIRICAL LEGAL STUD. 507, 533 (2007) (concluding that *Bush v. Gore* has not undermined public confidence in the Supreme Court); Micah Schwartzman, *Judicial Sincerity*, 94 VA. L. REV. 987, 1023–24 (2008). Of course, disobedience may have been more rampant following a divided *Brown* decision, and the Court may have actually gained strength in the public's eyes from a unanimous decision in *Bush v. Gore*.

192. *See e.g.*, Letter from Joseph Story to Henry Wheaton (Apr. 8, 1818), *in* 1 LIFE AND LETTERS OF JOSEPH STORY 303, at 303–04 (William W. Story ed., 1851) (On one occasion, Story suppressed a strong urge to dissent, noting that "Judge Washington thinks (and very correctly) that the habit of delivering dissenting opinions on ordinary occasions weakens the authority of the Court, and is of no public benefit"); Tushnet, *supra* note 8, at 496 (recounting Chief Justice Roberts's opinion that dissents should be minimized).

193. *See e.g.*, BOB WOODWARD & SCOTT ARMSTRONG, THE BRETHREN: INSIDE THE SUPREME COURT 310–44 (1979) (recounting revisions made to Chief Justice Burger's opinion in *Nixon* to achieve unanimity).

194. *See* Tushnet, *supra* note 8, at 497–98.

positions.[195] It also provides a means to form supermajorities without diluting the rules written in the opinions.

Moreover, vote trading to avoid separate opinions may promote collegiality. As is frequently observed, separate opinions may offend colleagues and cause tension on the court.[196] Vote trading provides a means to avoid this tension through negotiation. Instead of publicly voicing disagreement, judges may resolve their disputes through a bargain.

Vote trading to achieve supermajorities should be easier to accomplish than other types of vote trading. The judge whose vote must be purchased will charge a lower price because he experiences lower costs than with logrolling to form a majority outcome or opinion. For that judge, joining a majority opinion to create a supermajority does not result in erroneous legal doctrine or producing a bad outcome, since his vote is not essential to the outcome. Rather, the cost to him is not issuing a separate opinion. That separate opinion may provide catharsis, allow the judge to air views that will increase the judge's popularity, and provide the foundation for the adoption of his views in a future case.[197] But those costs are undoubtedly more often lower than those resulting from providing the critical vote to establish an outcome or doctrine that the judge thinks is erroneous.

B. *Objections to Logrolling to Form Supermajorities*

Vote trading to form supermajorities raises fewer objections than trades to form majority support for outcomes or doctrines. Logrolling to secure a supermajority does not raise accuracy concerns under Condorcet's Jury Theorem, because it does not result in the displacement of a decision that had the support of more judges. Nor does joining a preexisting majority present equivalent legitimacy concerns as outcome and rationale trading, because joining the majority does not affect the outcome or rationale. There is also not a norm against a judge joining a preexisting majority with which he disagrees. Judges frequently acquiesce in the views of the judge drafting the majority opinion because they do not have the time to write separately

195. That the judges disagree on how to decide the case does not mean that unanimity is unjustified. In a sensitive case, unanimity might be important, regardless of how the case is decided. One can imagine, for example, that the public would have more readily accepted the decision of the Supreme Court in *Bush v. Gore* if that decision were unanimous, irrespective of how the Court decided the case.

196. *See* Cross, *supra* note 9, at 1414; Kermit V. Lipez, *Some Reflections on Dissenting*, 57 ME. L. REV. 313, 314 (2005).

197. CHARLES EVANS HUGHES, THE SUPREME COURT OF THE UNITED STATES 68 (1928) ("A dissent in a court of last resort is an appeal to the brooding spirit of the law, to the intelligence of a future day, when a later decision may possibly correct the error into which the dissenting judge believes the court to have been betrayed.").

or out of concerns about collegiality.[198] Indeed, judges may acquiesce in part on the expectation that other judges will reciprocate the favor in a future case.[199] Logrolling simply makes that tacit understanding explicit.

The main objection against securing supermajorities through logrolling is that it reduces the number of dissents and other oblique opinions, especially when logrolling is used to achieve unanimity.[200] Separate opinions sometimes are valuable to the judicial process. They may improve the quality of majority opinions by requiring those majority opinions to respond to the arguments in the separate opinion.[201] Moreover, separate opinions may provide reasoning that may be useful to correct perceived errors in the majority opinion.[202] Opinions that did not carry the day in the past may prevail in the future.[203] In the circuit courts, dissents may persuade a majority of the Supreme Court on review.[204] In the Supreme Court, the reasoning in a dissent on statutory interpretations may convince Congress to enact new legislation, and for constitutional matters, dissents may lead the Court to reconsider the doctrinal test in a future case.[205]

As with the benefits of unanimity, these benefits of dissents are hard to measure and may be nonexistent in some cases. In some cases the arguments in separate opinions may simply weaken the majority instead of making the majority better. Although a separate opinion may provide a basis for future changes in the law, not all majority opinions should be changed; even if they engender disagreement, many majority opinions

198. POSNER, *supra* note 163, at 32; Epstein, *supra* note 163, at 104. Indeed, historically, Justices who voted with the majority on the disposition of a case did not have an opportunity to review the opinion before its publication. *See* White, *supra* note 164, at 1504–05.

199. Caminker, *supra* note 6, at 2332 (arguing that such implicit logrolling occurs).

200. Logrolling to secure a majority, as opposed to a supermajority, also may reduce the number of opinions, but only marginally so. That is because logrolling in that circumstance will occur only when the purchasing judge does not yet have majority support for his opinion, and that judge will purchase only as many votes as are necessary to secure a bare majority. There will still be judges who disagree with the opinion whose vote has not been bought—on a three judge court, there will be one dissenter, on a five member court, two dissenters, and so on—and those judges will still produce separate opinions. Moreover, the benefits of this logrolling—providing guidance through a rule for future cases—almost certainly exceed the costs.

201. Epstein, *supra* note 163, at 104, 120; Lipez, *supra* note 196, at 322–23.

202. Brennan, *supra* note 185, at 430; Epstein, *supra* note 163, at 103–04.

203. CASS R. SUNSTEIN, WHY SOCIETIES NEED DISSENT 71 (2003) (claiming that in the United States Supreme Court, dissenting opinions have eventually become the law on over 130 occasions).

204. Simpson, *supra* note 185, at 215–16.

205. The reasoning in a dissent could conceivably persuade the people in general to adopt a constitutional amendment. But because amendments are so difficult to enact, as a practical matter, only the judiciary can change constitutional interpretations. For this reason, stare decisis has less force in constitutional matters. Courts are more willing to reconsider past constitutional doctrinal tests when those doctrinal tests too often produce bad results.

are better than the alternatives laid out in separate opinions.[206] More important, a separate opinion is not necessary for a change. Even without dissents, politicians will rail against unpopular decisions, lawyers will continue to write briefs arguing in favor of previously rejected legal tests, and academics will continue to produce scholarship evaluating the merits of decisions and proposing alternatives. It is hardly unreasonable to conclude that, at least in some cases, the benefits of achieving unanimity or even a supermajority exceed the costs of the loss of these separate opinions.

IV. ALLOWING LIMITED LOGROLLING

What should be clear at this point is that a blanket condemnation of vote trading is unwarranted. Some vote trading may improve the appellate process and does not trigger the objections that critics make to vote trading. This Part discusses three situations when the case for allowing vote trading is strongest: when a majority cannot agree on a disposition; when the trade relates to the rationale for a decision; and when the trade is to achieve unanimity in cases in which unanimity might be necessary to secure obedience.

A. *Split Decisions*

Logrolling should be permitted in cases where no single disposition commands a majority of the judges. Logrolling in that case does not raise the legitimacy concern of changing dispositions, because the lack of a majority means that there is not a disposition to be changed.

One caveat is that judges should be hesitant to break plurality agreements through vote trading when the question presented is one that has an exogenously defined correct answer.[207] As noted earlier, for questions of that sort, the conclusion of a plurality is more likely to be correct than the conclusion of a smaller group under Condorcet's Jury Theorem.[208] Thus, if the judges on a seven member court divide 3–2–2, it is presumptively better for a member of one of the groups of two to join the group of three rather than vice versa. This is not to say that pluralities should never be broken. A member of a smaller group may be an expert. But identifying that expert may be hard to do, and judges accordingly should proceed cautiously.

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206. For example, although Justice Holmes is known as the "great dissenter" for the quality of his dissents, less than 10% of his dissents have resulted in changes in the law, and the percentage is lower for most other Justices. *See* Antonin Scalia, *The Dissenting Opinion, Address Before the Supreme Court Historical Society*, *in* 1994 J. SUP. CT. HIST. 33, 37 (1994).

207. This concern does not apply when the question does not have an exogenously defined correct answer because the Jury Theorem does not apply. *See supra* text accompanying notes 169–73.

208. *See supra* Subsection I.B.4.a.

B. *Forming Majority Support for Rationales*

Judges should also be permitted to trade votes on the rationales underlying decisions when that trade does not affect the outcome of the cases. Allowing logrolling in this circumstance may lead to better doctrines and would increase the likelihood of the court creating clear doctrine of appropriate scope and depth.[209]

As explained earlier, logrolling in this circumstance raises few concerns. Trading votes to establish doctrines does not present legitimacy or equality concerns.[210] Moreover, it is not likely to result in "worse" doctrines, and even if it did result in suboptimal doctrines in some cases, the gains from the production of clear rules may well exceed the costs of those mistakes.[211]

In saying that judges should be permitted to trade votes to establish doctrine, it is important to distinguish cases in which judges disagree on the appropriate rule to apply from cases in which the judges agree on the rule but simply disagree on the application of a preexisting doctrinal test. In the latter case, the disagreement is essentially one of outcome instead of the appropriate doctrine to apply, and vote trading would not provide significant clarification of the law.[212] Judges therefore should not engage in logrolling in that circumstance.

Of course, permitting logrolling in this situation would not guarantee that every decision produces a clear, broad rule. The judge seeking to purchase the vote of another judge might think that a narrow, minimal rule is the correct doctrine for a particular issue. But logrolling will tend to reduce instances of minimalist opinions that result solely from disagreement among judges.

Moreover, permitting logrolling of this sort would not prevent all pluralities. The disagreement between two judges over what doctrine to adopt may be so extreme that the price to change votes is prohibitively high, in which case a plurality opinion is likely to result. Nor will logrolling prevent all compromise opinions. A judge may find it less expensive—that he needs to give up fewer votes in other cases—to change his opinion to some degree to accommodate the views of disagreeing judges than to insist that judges join the opinion that reflects only the views of the drafting judge.[213] But allowing logrolling will

209. *See supra* Section II.A.

210. *See supra* text accompanying note 158.

211. *See supra* Subsection II.B.2.a.

212. *See* Empire Healthchoice Assurance, Inc. v. McVeigh, 547 U.S. 677, 700 (2006) (explaining that resolving a single application of a law would not usefully clarify that law).

213. Take, for example, a case considering whether a bank is liable for the losses of its investors, in which the drafting judge seeks to impose liability. Another judge may place a value of -5 on an opinion that declares a bank is always liable for investor losses, but a value of -2 on an opinion that limits its reasoning to establishing that the bank in the case at hand is liable.

reduce the frequency and extent of compromises. Logrolling thus should, on average across all cases, increase the clarity and quality of doctrine overall.

A more controversial proposal is that judges should be permitted to trade votes on rationales even if that trade results in a change in the disposition of the case. Trades of this sort could promote the goal of clarifying the law. For example, consider a nine-judge panel where four judges (Group *A*) believe test X should apply and would affirm the lower court; one judge (Judge *B*) believes test Y should apply and would affirm the lower court; and four judges (Group *C*) believe test Y should apply and would reverse the lower court.[214] Suppose further that Judge *B* and Group *C* are adamantly opposed to Group *A*'s test, and would not join Group *A*'s opinion under any circumstance. If each judge voted sincerely, the outcome would be to affirm, but the decision would not establish a binding doctrinal test, since fewer than five judges concurring in the judgment agreed on a single test. But if vote trading were allowed, Group *C* could purchase Judge *B*'s vote. The trade would change the outcome to reverse instead of affirm, but also establish test Y as binding doctrine.[215]

At the same time, however, trades that change outcomes raise due process and legitimacy concerns because they result in cases being decided based on considerations other than the merits of the parties' arguments.[216] That the change in outcome is a consequence of vote trades on rationales instead of an effort simply to produce outcomes ameliorates those concerns to some degree. As noted earlier, under current practice, a judge may change his position on the outcome of a case based on his efforts to fashion a better doctrine for future cases.[217] Still, allowing outcomes to shift based on vote trades creates a sense of

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Whether the drafting judge would be willing to engage in logrolling to secure support for the broader opinion would depend on the value that the judge places on the broader doctrine. If it is important to him, he will be willing to pay for it.

214. This situation is comparable to what occurred in *Florida v. Riley*, 488 U.S. 445 (1989). In *Riley*, the United States Supreme Court considered whether surveillance from a helicopter 400 feet above property constituted a search under the Fourth Amendment. *Id.* at 448. A plurality of four Justices concluded that the surveillance did not constitute a search because FAA regulations allowed helicopters to fly at 400 feet. *Id.* at 451. Four Justices dissented, concluding that compliance with FAA regulations should not determine what constitutes a search. *Id.* at 464–65 (Brennan, J., dissenting); *id.* at 467–68 (Blackmun, J., dissenting). Justice Sandra Day O'Connor concurred in the judgment, agreeing with the dissent that FAA regulations should not determine what constitutes a search but nevertheless concluding that no search occurred. *Id.* at 452–53 (O'Connor, J., concurring).

215. Theoretically, Judge *B* could purchase Group *C*'s vote, which would not change the outcome of the case. But that trade is unlikely because it would require Judge *B* to feel so strongly about the matter that he is willing to purchase four votes.

216. *See supra* text accompanying notes 42–44.

217. *See supra* text accompanying notes 45–48.

uneasiness.

Whether the benefit of doctrinal clarification should outweigh the concerns that arise from disposition switching depends on the role of the court. If the primary function of the court is to decide each case as it arises before the court, justifying any logrolling that results in outcome changes is hard to do; but if the role of the court is to clarify law, there is greater reason to allow vote trades on rationale that happen to affect outcome. Against this backdrop, it seems reasonable to conclude that logrolling on rationales that happens to change the outcome should be permitted in the Supreme Court. The Court does not sit to correct erroneous judgments entered by lower courts; its primary responsibility is announcing and clarifying doctrine.[218] Indeed, the Court has already adopted procedures that maximize its ability to engage in the rule creation function at the expense of correcting lower court judgments. Through the certiorari process, the Court routinely refuses to review erroneous lower court judgments, granting review only in those cases that present a good vehicle to clarify the law. For this reason, logrolling among the Justices that results in outcome changes should be permitted, so long as that logrolling also results in increased doctrinal clarity.[219]

Justifying logrolling of this sort in the circuit courts is more difficult to do. Although they create rules, the circuit courts are primarily courts of error correction. Their principal task is to ensure that the correct judgment is entered in the precise case before them. Moreover, their role in law creation is less significant than is the Supreme Court's, because the rules they create apply only in the geographical area covered by that court. Still, circuit courts do create doctrine, and as with the Supreme Court, they do so with an eye towards future cases.[220] What this suggests is that logrolling should not be forbidden in the circuit courts; rather, there should be a strong presumption against it. That presumption could be overcome when fashioning a clear rule for future cases is of critical importance because of the frequency with which the issue arises and the consequences of uncertainty in the law.

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218. Posner, *supra* note 88, at 37.

219. Justices have apparently engaged in conduct of this sort. For example, Justice William Brennan voted in favor of an exception to *Miranda* so that he could assign himself the opinion to control the scope of the exception. FORREST MALTZMAN, JAMES F. SPRIGGS II & PAUL J. WAHLBECK, CRAFTING LAW ON THE SUPREME COURT: THE COLLEGIAL GAME 3 (2000).

220. *See, e.g.*, Holston Invs., Inc. B.V.I. v. LanLogistics Corp., 677 F.3d 1068, 1071 (11th Cir. 2012) (adopting a "bright-line" jurisdictional rule, explaining that the "undeserved access to a fair forum is a small price to pay for the clarity and predictability that a bright-line rule provides"); Fallon, *supra* note 26, at 56–57 (explaining that extra-legal considerations often inform doctrinal development).

C. *Unanimity in Extremely Important Cases*

The Supreme Court may also be justified in engaging in logrolling to achieve unanimity in cases where the presence of a dissent presents a serious threat of disobedience, as in *Nixon* and *Brown*.[221] Securing compliance through unanimity protects the integrity of the judgment; protects the prestige, power, and legitimacy of the Court; and avoids the constitutional crisis that could result from disobedience. The benefits of achieving unanimity through logrolling in these circumstances therefore may exceed the costs.[222]

This justification also does not readily extend to the courts of appeal. Because appellate courts are inferior courts, individuals who would flaunt authority by disobeying a decision if it is not unanimous are unlikely to feel bound by an appellate decision, even if it is unanimous. Further, because they may be appealed to the Supreme Court, the judgments of appellate courts are not final. Unanimity in the intermediate court does not ensure that the ultimate arbiters, the members of the Supreme Court, will agree. Thus, individuals who are inclined not to obey a court decision if there is a dissent may not feel bound by a decision of the court of appeals, even if it is unanimous. Achieving unanimity in the appellate courts therefore is far less likely to be worth the costs.

CONCLUSION

Judicial logrolling has the potential to improve the appellate courts' ability to perform their functions. It may promote increased stability and predictability in the law, resolve intractable disagreements in how to dispose of cases, and provide a means to secure supermajority support for a decision despite disagreement among the judges. But the objections to the practice are substantial. Accordingly, logrolling should be limited to those situations that minimize the objections to avoid

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221. Frank B. Cross & Stefanie Lindquist, *Doctrinal and Strategic Influences of the Chief Justice: The Decisional Significance of the Chief Justice*, 154 U. PA. L. REV. 1665, 1677–78 (2006) ("The ability to produce unanimous decisions in controversial cases, such as *Brown* and *United States v. Nixon*, are often regarded as vital, since the 'decisions would have lost much of their authority had there been dissenting opinions around which the opposition might have rallied.'" (internal citations omitted)); Charles M. Lamb & Lisa K. Parshall, United States v. Nixon *Revisited: A Case Study in Supreme Court Decision-Making*, 58 U. PITT. L. REV. 71, 107–08 (1996) (claiming that the effort to make *Nixon* unanimous was intended to give the President no excuse for disobedience).

222. Theoretically, there may be situations where merely securing bipartisan, though not majority, support for a decision suffices to protect the legitimacy of the court or to ensure compliance. *See* Laura Denvir Stith & Jeremy Root, *The Missouri Nonpartisan Court Plan: The Least Political Method of Selecting High Quality Judges*, 74 MO. L. REV. 711, 742 (2009) (arguing that decisions along perceived partisan lines undermine public perception of the Supreme Court). In that situation, logrolling may be justified as well.

undermining the legitimacy of the courts or generating worse decisions.

Implementing a logrolling system would take time and effort. For example, courts would have to develop a system of accounting to keep track of who owes whom votes,[223] and judges would have to familiarize themselves with the process of negotiation.

Allowing logrolling would also raise a number of questions.[224] For example, one might worry that logrolling would be unmanageable because judges may game the system. A judge might falsely state he disagrees with a position in order to gain leverage in logrolling,[225] or he might refuse to uphold his end of the bargain in a vote trade after the other judge has already voted. But the design of the courts discourages judges from engaging in these strategies. Appellate courts are relatively

223. In a court system with a substantial number of cases on the docket, this accounting problem should not be significant. With a high enough volume, judges will be able to find enough cases in which they disagree to be able to settle debts contemporaneously. When the docket has fewer cases, however, there may not be enough cases on the docket presenting an opportunity for a trade. Judges will have to keep records of their debts, which can be called in future cases.

224. One concern sometimes mentioned with logrolling is that it may result in the inability to reach a decision because there is always a better deal available. For example, suppose there are two cases: one challenging a statute discriminating against homosexuals; the other challenging a statute limiting the right to possess handguns. Judge *A* thinks strict scrutiny should apply to the discriminatory statute and rational basis should apply to the handgun law; moreover, it is more important to Judge *A* that the strict scrutiny test be adopted for discrimination against homosexuals than the rational basis test in the handgun case. Judge *B* thinks rational basis should apply to the discriminatory statute and strict scrutiny should apply to the handgun law; moreover, it is more important to Judge *B* that the strict scrutiny test be adopted in the handgun case than that the rational basis test apply for discrimination against homosexuals. Judge *C* thinks rational basis should apply to both. Without logrolling, rational basis will be adopted in both cases, but Judges *A* and *B* could trade votes to secure strict scrutiny in both. Judge *C* could break that agreement by offering to Judge *B* to vote for rational basis for the discriminatory statute and strict scrutiny for the handgun law. Judge *C* would prefer that outcome since it would result in rational basis in at least one case. For Judge *A*, however, the outcome is the least preferred since it produces in both cases doctrines with which he disagrees. Judge *A* could break the agreement between Judges *B* and *C* by offering to Judge *C* to vote for rational basis in both cases. Cycling of this sort is not unique to logrolling, however; it is inevitable in any majority voting system where there are more than two possible outcomes and the voters rank those outcomes differently. *See* Frank E. Easterbrook, *Ways of Criticizing the Court*, 95 HARV. L. REV. 802, 815–17 (1982). Infinite cycling would not occur because courts must eventually render decisions.

225. This concern is not unique to logrolling. The current practice of compromise presents the opportunity for bluffing. A strategic judge may overstate his preferences in order to anchor the debate in a way that will shift the eventual opinion closer to his preferences. For example, suppose there is a case considering whether the Equal Protection Clause forbids discrimination against homosexuals. Judge *A* believes that intermediate scrutiny should apply. But others in the potential majority think some lower level of scrutiny should apply. If Judge *A* announces his sincere views, the compromise will likely lead to a test less than intermediate scrutiny. Judge *A* therefore may overstate his preference, arguing that strict scrutiny should apply. By doing so, he anchors the debate so that intermediate scrutiny appears to be a compromise.

small institutions, ranging from twenty-seven active judges in the Ninth Circuit[226] to ten on the D.C. Circuit.[227] The judges frequently must work together in hearing cases, and they do so for an extended amount of time because of life tenure. These conditions—a small court with repeated interactions over a long timeframe—mean that the judges can realistically monitor the behavior of each other to detect bad faith. They also provide judges with a realistic opportunity to retaliate by exacting a higher price to join the decisions of the offender in future cases, issuing harsher dissents against the offending judge in future cases, and a variety of other ways.[228]

Another important question is whether, if logrolling is allowed, the courts should inform the public about it.[229] There is a general consensus that courts should not operate according to secret rules. Among other things, having a transparent decisionmaking process and providing candid explanations for decisions demonstrates respect for the public, develops public trust, and increases accountability.[230]

But candor is far from an absolute requirement. Even the most ardent supporters of candor have acknowledged that judges should occasionally sacrifice candor and transparency in the name of pursuing other goals.[231] Consistent with that view, judges often choose not to be transparent and candid. Judges acquiesce in decisions with which they disagree because they do not want to highlight the importance of the majority decision, they feel a sense of collegiality, they lack the time to produce a separate opinion, or they perceive the importance of the members of the court appearing unified behind a ruling.[232] Similarly, judges rely on legal fictions in their opinions instead of providing the actual reasons for their rulings because the fictions are more readily

226. *Judges of this Court in Order of Seniority*, UNITED STATES COURTS FOR THE NINTH CIRCUIT, http://www.ca9.uscourts.gov/content/view_seniority_list.php?pk_id=0000000035 (last updated Oct. 2012). This count excludes Senior Circuit Judges and the Chief Judge.

227. *Judges*, UNITED STATES COURT OF APPEALS, DISTRICT OF COLUMBIA CIRCUIT, http://www.cadc.uscourts.gov/internet/home.nsf (last visited Dec. 17, 2012).

228. *Cf.* Epstein, *supra* note 163, at 130 (finding that these same considerations reduce the number of dissents).

229. *See* David L. Shapiro, *In Defense of Judicial Candor*, 100 HARV. L. REV. 731, 742–43 (1987) (arguing that secret vote trading should not occur).

230. Some have argued that candor also increases the predictability of how a ruling will apply in the future because it provides litigants with the actual reason for a decision. *See, e.g.*, Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1, 72 (1985). *But see* Nicholas S. Zeppos, *Judicial Candor and Statutory Interpretation*, 78 GEO. L.J. 353, 402 (1990) (arguing that candor does not increase predictability). Logrolling does not undermine predictability from candor insofar as the vote exchange does not change the fact that the reasons provided in the decision are the legal basis for decision.

231. *See* Shapiro, *supra* note 229, at 749–50 (arguing that judges should lie about the legal rule when applying that legal rule would violate a moral right).

232. Cross, *supra* note 9, at 1416–17; *see* Epstein, *supra* note 163, at 103–04.

accepted.[233] More important, judges conduct deliberations behind closed doors, and they do not publicize the compromises they strike in producing majority opinions.

Similar concerns suggest that not disclosing logrolling might be the more prudent course. It is possible that, if the judiciary explained that it allowed logrolling in limited circumstances where the logrolling could produce significant benefits and few costs, the public would see logrolling as a welcome improvement and respect the judiciary for explaining why it allowed limited logrolling.[234] But it seems more likely that disclosure would result in a loss of public support for the judiciary based on the perception that courts are no longer deciding cases according to law, but instead are simply brokering deals to produce desired outcomes. At the very least, given the current practice of not acknowledging when acquiescence occurs and not revealing which decisions are the product of compromise, not disclosing logrolling would essentially maintain the status quo.

Permitting logrolling might also have a number of ripple effects on the judiciary. It may change the incentives of parties to invest in litigation because of the perception that decisions depend less on the strength of argument and more on the negotiations between judges. It may reduce the influence of swing judges, since with vote trading every judge is potentially in play in every case.[235] Allowing vote trading may also affect the appointments process because negotiation skills would become a more important characteristic.

Permitting logrolling will not mean that logrolling will or even should be the exclusive means for resolving disagreements. Judges should still write separately in cases in which they feel so strongly that they are unwilling to exchange their votes. Likewise, a judge will still compromise by modifying an opinion to accommodate the views of a disagreeing judge in cases in which the disagreeing judge demands too high a price to join an opinion that reflects only the views of the drafting judge.[236] But allowing logrolling would expand the tools with which judges could resolve their disagreements and lead to appellate courts performing their functions better.

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233. Peter J. Smith, *New Legal Fictions*, 95 GEO. L.J. 1435, 1478 (2007).

234. Disclosure might also change the view of the judiciary, though not necessarily for the worse. For example, supermajority coalitions might be understood to reflect, not so much that the judges on a court do agree, but that they think the issue is important enough to warrant forging deals so that the decision has the support of a supermajority. Supermajorities therefore would reflect a judgment of importance, instead of a judgment of correctness, of a decision.

235. One might argue that the fact that a swing judge does not consistently vote with one bloc of judges indicates that he is less committed to his position and therefore more willing to engage in vote trading. But that conclusion is not warranted. A judge's tendency to join different groups might reflect a more nuanced or different view of the law rather than a lack of conviction about what position is correct.

236. *See, e.g.*, *supra* note 213.